Sage Development Company, Joe Guzman Construction Co., M & O Construction Co., Inc. *and* Arizona District Council of Carpenters, an affiliate of United Brotherhood of Carpenters and Joiners of America, AFL–CIO. Cases 28–CA–7039, 28–CA–7040, and 28–CA–7041

February 28, 1991

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND DEVANEY

On August 30, 1984, Administrative Law Judge Michael D. Stevenson issued the attached decision. The Respondents filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions and a supporting brief. The General Counsel filed an answering brief to the Respondents' exceptions, and the Respondents filed an answering brief to the General Counsel's cross-exceptions. The Charging Party incorporated by reference the General Counsel's cross-exceptions, supporting brief, and answering brief.

On February 20, 1987, the Board issued its Decision and Order in *John Deklewa & Sons*, 282 NLRB 1375, enfd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988), cert. denied 488 U.S. 889 (1988). On April 1, 1987, the Respondents filed with the Board a request to file a supplemental brief regarding the impact of *Deklewa* on this proceeding. The Board granted the Respondents' request on April 16, 1987. On May 15, 1987, the Respondents filed a supplemental brief, with affidavits attached. Thereafter, the General Counsel and the Charging Party each filed an answering brief and a motion to strike affidavits. The Respondents filed a response to the motions to strike affidavits; the General Counsel filed a motion to strike the Respondents' response to the motions to strike affidavits; and the Respondents filed a response to the General Counsel's motion to strike.

On July 29, 1988, the Board issued an Order Remanding[1] to the judge for further consideration of the case consistent with *Deklewa*, including, if necessary, a reopening of the record to adduce further evidence on the exclusive representative status of the Union.

The judge issued the attached supplemental decision on November 16, 1988. The General Counsel and the Charging Party each filed exceptions and a supporting brief. Respondents Sage Development Company (Sage) and M & O Construction Co., Inc. (M & O) filed an answering brief to the General Counsel's and the Charging Party's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

For many years, the Respondents had signed memorandum agreements which incorporated the collective-bargaining agreements between the Arizona Associated General Contractors (AGC) and the Union. The most recent of these agreements as of the time of the hearing was effective from June 1, 1979, to May 31, 1982. It is undisputed that the Respondents timely withdrew from multiemployer bargaining in late February or early March 1982. From June 1 until September 2, 1982, the Respondents unilaterally failed and refused to abide by the exclusive referral and hiring hall procedures contained in the expired collective-bargaining agreement. It was stipulated at the hearing that the Respondents and the Union failed to agree to a subsequent contract.[2]

The judge in his original decision found that the Respondents violated Section 8(a)(5) and (1) of the Act by refusing to abide by the hiring hall and referral provisions in the 1979–1982 collective-bargaining agreement. In so doing, the judge implicitly found that the Union was the exclusive representative under Section 9(a) of the Respondents' unit employees. The Respondents had admitted the Union's 9(a) status in their respective answers to the complaint and in a written stipulation at the hearing.

Pursuant to the Board's Order Remanding, the judge issued an order directing the parties to submit statements of position.[3] Respondents Sage and M & O, in their statements of position, filed a motion for leave to amend answer and to withdraw stipulation, and submitted affidavits of their officials stating that at no time did the Union offer any proof of majority status through an election, certification, or by any other means. Respondent Joe Guzman Construction Co. (Guzman), however, elected not to participate in the remand proceeding, and thus it has not withdrawn the admissions and stipulations by which it admitted the 9(a) status of the Union. Counsel for the General Counsel urged before the judge that the record be reopened and a supplemental hearing be held on the issues raised by the remand, but acknowledged that he currently lacked any evidence to prove the Union's 9(a) status.

1. We agree, for the reasons set forth by the judge in his supplemental decision, that the agreements entered into by Respondents Sage and M & O with the Union were 8(f) agreements and, accordingly, we now analyze this case as to these two Respondents under the 8(f) principles set forth in *Deklewa.*

[1] Not reported in Board volumes.

[2] The judge erroneously found, contrary to the written stipulation, that the Respondents agreed to the new contract between the Union and the Arizona AGC effective September 2, 1982.

[3] The Board's Order Remanding acknowledged that admissions of 9(a) status in pending cases arising prior to the issuance of *Deklewa* must be evaluated in light of the possibility that they were premised on the ''conversion doctrine,'' which was expressly abandoned in *Deklewa.* The Board thus stated that timely withdrawal of such admissions based on *Deklewa* would be accepted.

In *Deklewa*, 282 NLRB at 1377–1378, the Board abandoned the conversion doctrine and decided to apply the following principles in 8(f) cases:

> (1) a collective-bargaining agreement permitted by Section 8(f) shall be enforceable through the mechanisms of Section 8(a)(5) and Section 8(b)(3); (2) such agreements will not bar the processing of valid petitions filed pursuant to Section 9(c) and Section 9(e); (3) in processing such petitions, the appropriate unit normally will be the single employer's employees covered by the agreement; and (4) upon the expiration of such agreements, the signatory union will enjoy no presumption of majority status, and either party may repudiate the 8(f) bargaining relationship.

The Board also noted, at footnote 41 of *Deklewa*, that it will require the party asserting the existence of a 9(a) relationship to prove it.

We adopt the judge's finding in his supplemental decision that the General Counsel lacks evidence to meet his burden to prove the existence of a 9(a) relationship between these parties.[4] Accordingly, we find that under *Deklewa* the Union enjoyed no presumption of majority status following the May 31, 1982 expiration date of the most recent collective-bargaining agreement, and therefore the Respondents were free to repudiate the contract at that time. Thus, we conclude that Respondents Sage and M & O did not violate Section 8(a)(5) and (1) by failing to abide by the contract's referral and hiring hall procedures from June 1 to September 2, 1982, and we dismiss the complaint as to Respondents Sage and M & O.

2. As to Respondent Guzman, we agree with the judge's recommendation in his supplemental decision that Respondent Guzman's relationship with the Union should be treated as a 9(a) relationship because Respondent Guzman failed to withdraw its prior admissions and stipulations regarding the Union's 9(a) status. Thus, only with respect to Guzman, the Board, having considered the judge's original decision and the record in light of the exceptions and briefs in that proceeding,[5] has decided to affirm the judge's rulings, findings,[6] and conclusions only to the extent consistent with this Decision and Order.

The judge, in finding that the parties did not reach impasse, relied particularly on his finding that the Respondents failed to bargain in good faith. For the reasons set forth below, we find, contrary to the judge, that the evidence is insufficient to establish that Respondent Guzman engaged in bad-faith bargaining. Accordingly, we further find, contrary to the judge, that Respondent Guzman and the Union reached impasse, and thus we dismiss the complaint allegation that Respondent Guzman violated Section 8(a)(5) and (1) of the Act by unilaterally failing and refusing to abide by the hiring hall and referral provisions in the expired contract.

As stated above, the most recent agreement between the AGC and the Union was effective from June 1, 1979, to May 31, 1982.[7] The Respondents had all suffered substantial losses during the period of 1979–1982,[8] and they timely withdrew from multiemployer bargaining in early 1982. In late February or early March 1982, the Respondents retained Robert L. Scott, a management consultant, to represent them in negotiations with the Union.

Scott met with the Union eight times: on March 31, April 26, May 3, 10, 18, 20, and 26, and June 1. At the March 31 session, Scott explained that the Respondents needed concessions from the Union because of nonunion competition, and that an agreement had to be reached no later than June 1 because of the Respondents' dire economic situation. Scott then presented the Respondents' initial proposal to the Union,[9] describing it as a ''non-union union proposal'' and as having ''no fat.''[10] The Union objected to all or most of the Respondents' proposal.

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[4] We further agree with the judge's rejection of the General Counsel's request to engage in general unrestricted discovery of the Respondents' witnesses, files, and records in order to find evidence on the Union's 9(a) status. We also agree with the judge's rejection of the General Counsel's contention that by entering into certain settlement agreements, the Respondents impliedly recognized the Union as a 9(a) representative.

[5] The Respondents had requested oral argument in that proceeding. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[6] The Respondents excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In sec. III,B,1,c (1), par. 2, third sentence, of the judge's decision, the judge inadvertently referred to ''employees'' instead of ''employers.''

The General Counsel excepted to the judge's finding that the Respondents suffered substantial losses during the period of 1979–1982, contending that the record indicates only that the Respondents experienced a decline in sales rather than suffered business losses. We do not find merit in the General Counsel's exception, as we note that ''losses'' can reasonably be interpreted to include a decline in sales.

The Respondents excepted to the judge's finding that Sage suffered greater losses during the period of 1979–1982 than Guzman and M & O. We find merit to this exception, as the record indicates that Guzman and M & O suffered greater losses than Sage during the relevant time period.

[7] All dates are in 1982 unless otherwise noted.

[8] The judge noted that two developments had occurred which caused the Respondents' businesses to be affected adversely: (1) a general decline in the homebuilding industry in Arizona and elsewhere; and (2) aggressive competition from nonunion construction companies. He further noted that the Respondents had presented evidence reflecting general declines in gross revenues and reduction in market shares.

[9] The Respondents' proposal included abolishing the pension plan, changing the hiring hall from being mandatory to voluntary, changing health insurance to eliminate dependent coverage, permitting unlimited subcontracting, allowing no exceptions to the no-strike clause, changing wage rates and classifications, allowing unilateral employer classification of new employees, and allowing employees during slow periods to request the Union to meet with the employer to enter into temporary modifications of the agreement.

[10] Scott testified that he used the term ''union/non-union'' proposal, by which he meant a proposal drafted to permit the Respondents to compete with

Throughout negotiations, Scott made some changes to his initial proposal,[11] and continually stressed to the Union that he needed an agreement by May 31. The Union presented what was essentially the former AGC contract as its initial proposal, but eventually made some concessions on May 20.[12] On the major disputes between the parties, however, no progress was made. On May 20, Scott thanked the Union for the above concessions, but stated that ''his guys'' were firm in their proposal and he did not think that the concessions would do much good. Moreover, at the beginning of the May 20 session, Scott announced that ''today is bottom line day.''[13]

At the May 26 session, Scott stated that he had prepared a final offer which was to become effective on June 1 if not accepted by the Union prior to that date. The parties agreed to meet on May 27, but the meeting was never held because the Union's negotiator had a scheduling conflict. The final bargaining session was held on June 1, and at that session Scott announced that the terms of the Respondents' final offer were effective as of that date. From June 1 through September 2, each of the Respondents ceased abiding by the exclusive referral and hiring hall procedures contained in the expired collective-bargaining agreement.

While the negotiating sessions were occurring, Respondents M & O and Sage engaged in certain ''away from the table'' conduct, including statements indicating those Respondents wanted to go nonunion. There was no evidence that Respondent Guzman engaged in any ''away from the table'' conduct.

In his original decision, the judge initially determined that an exclusive hiring hall provision survives the expiration of a collective-bargaining agreement, citing *Southwest Security Equipment Corp.*, 262 NLRB 665 (1982), enfd. 736 F.2d 1332 (9th Cir. 1984).[14] The judge then noted that if an impasse occurred in the parties' bargaining, the Respondents acted lawfully in implementing a voluntary hiring hall provision because such a provision was part of the Respondents' pre-impasse proposals. Applying the criteria of *Taft Broadcasting Co.*, 163 NLRB 475 (1967), enfd. sub nom. *Television Artists AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968), the judge concluded that the parties did not reach impasse. The judge found that although the importance of the issues on which the parties disagreed and the parties' contemporaneous understanding of the state of negotiations supported a finding of impasse, the parties' bargaining history and the length of negotiations weighed against finding impasse.[15] Finding that none of the above factors was determinative of impasse, the judge then turned to the issue of the good faith of the parties. He found that the Respondents did not bargain in good faith, as evidenced by the content of the Respondents' proposals; Scott's conduct and statements at the bargaining sessions; the deadline imposed by the Respondents for agreement on a new contract; and the ''away from the table'' conduct of Respondents M & O and Sage, discussed above. Moreover, although there was no evidence regarding any ''away from the table'' conduct by Respondent Guzman, the judge found that Respondent Guzman's bad faith was demonstrated by the content of the Respondents' proposals and by Scott's conduct at the bargaining table. The judge additionally found that there was no evidence that the Union had bargained in bad faith.

Contrary to the judge, we find that in the absence of any ''away from the table'' conduct by Respondent Guzman, the remaining evidence is insufficient to establish that Respondent Guzman engaged in bad-faith bargaining. We first note the fundamental principle that Section 8(d) of the Act does not require either party in collective bargaining to agree to a proposal or to make a concession.[16] In determining whether Respondent Guzman bargained in bad faith, we examine the totality of the circumstances in which the bargaining took place.[17]

The judge, in relying on, inter alia, the Respondents' bargaining proposals in finding bad-faith bargaining, found that several of the proposals would involve virtual abolition of the Union's representative role, such as a voluntary hiring hall, unilateral employer classification of new employees, a no-strike clause with no exceptions, and allowing the Respondents to deal directly with employees during slow periods to negotiate lower pay rates. The judge stated that no union could have accepted these proposals and the Respondents must have known this.

An examination of the record reveals, however, that the Respondents' proposal did not involve direct dealing. Rather, the proposal stated that ''when work is slow and the employees covered by this Agreement wish to remain employed, the employees may request the Union to meet with the Contractor to enter tem-

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nonunion competition, and that by the phrase ''no fat'' he meant an honest proposal not loaded with provisions to be discarded later.

[11] Among the concessions made by the Respondents were adding dependent coverage to health insurance, some language changes regarding recognition and coverage of the agreement, a new provision on safety, adding an expedited process to grievance and arbitration, and deletion of the condition that journeymen must be at least 25 years old.

[12] These concessions included a new ''helper'' classification with a lower wage rate, reducing or eliminating premium pay for night-shift work, and 4 10-hour days for out-of-town work to reduce employer expenses.

[13] Scott testified that by this statement he was referring to his request at the prior meeting that the Union prepare the ''bottom line'' it could sell to its members.

[14] In adopting the judge's finding that a hiring hall provision survives the expiration of a collective-bargaining agreement, we find it unnecessary to rely on the cases cited by the judge at fn. 11 of his decision.

[15] While noting that there was precedent for finding impasse after only eight meetings, the judge declined to do so, considering that the Respondents were seeking significant union concessions, and that there were only 2 months in which to bargain before the contract's expiration.

[16] *NLRB v. American National Insurance Co.*, 343 U.S. 395, 404 (1952).

[17] See, e.g., *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984).

porary modification of this Agreement.'' Thus, the proposal did not provide that the Respondents could deal directly with the employees, and accordingly we disavow the judge's reliance on a direct dealing proposal.

Examining the remaining proposals relied on by the judge, we find that they do not establish that Respondent Guzman engaged in bad-faith bargaining. Regarding the judge's view that no union could have accepted such proposals, the Board stated in *Reichhold Chemicals*, 288 NLRB 69 (1988), reversed on other grounds sub nom. *Teamsters Local 515 v. NLRB*, 906 F.2d 719 (D.C. Cir. 1990), that its examination of specific bargaining proposals will not involve decisions ''that particular proposals are either 'acceptable' or 'unacceptable' to a party.'' Rather, the Board will examine proposals when appropriate and consider whether, on the basis of objective factors, a proposal is clearly designed to frustrate agreement on a collective-bargaining contract. *Reichhold*, above at 69. We further note the Respondents' perceived need for concessions in view of their substantial financial losses during the 3-year period preceding the instant negotiations. Presentation of concessionary proposals under such circumstances does not necessarily indicate bad faith. *Logemann Bros. Co.*, 298 NLRB 1018, 1020 (1990). Additionally, we note that the hiring hall and no-strike proposals involve mandatory subjects of bargaining, and thus we do not infer bad faith from such proposals. Accordingly, we find that the General Counsel has failed to adduce sufficient evidence that in the circumstances of the negotiations at issue, Respondent Guzman made the above proposals with the intent to frustrate an agreement.[18]

The judge further found that Respondent Guzman's bad faith was demonstrated by Scott's conduct and statements at the negotiations, such as the ''non-union union proposal,'' a ''no fat'' proposal, ''bottom-line day,'' and his ''quid pro quo'' statements.[19] Although some statements by negotiating parties may show an intent not to bargain in good faith, the Board is especially careful not to throw back in a party's face remarks made in the give-and-take atmosphere of collective bargaining. The Board has stated: ''To lend too close an ear to the bluster and banter of negotiations would frustrate the Act's strong policy of fostering free and open communications between the parties.''[20] In light of this standard, none of the remarks cited by the judge are sufficient to prove bad-faith intent to avoid reaching an agreement. *Logemann*, above at 1020.

Finally, in disagreeing with the judge that the deadline imposed by the Respondents for agreement on a new contract evidenced the Respondents' bad faith, we note that the Respondents, who had suffered substantial financial losses prior to negotiations, explained to the Union that they needed to reach an agreement by June 1 because of their dire economic condition. In the absence of other evidence of bad faith, we will not find the Respondents' deadline to be indicative of bad faith.[21]

In sum, we conclude that the totality of Respondent Guzman's conduct throughout the course of negotiations establishes that it engaged in lawful hard bargaining, rather than bad-faith bargaining, particularly in the absence of any ''away from the table'' conduct attributable to Respondent Guzman. We further find that in the absence of a finding of bad-faith bargaining, impasse was reached between the parties, and therefore Respondent Guzman acted lawfully in implementing a voluntary hiring hall provision. Accordingly, we shall dismiss the complaint.

ORDER

The complaint is dismissed.

[18] This case is distinguishable from cases such as *Modern Mfg. Co.*, 292 NLRB 10 (1988), and *Prentice Hall, Inc.*, 290 NLRB 646 (1988), in which a combination of proposals for a sweeping management-rights clause and a broad no-strike clause, with no effective grievance and arbitration procedure, amounted to a contract offer that would drastically curtail union representation rights. In those cases, an inference that the employer was not seeking to reach agreement was justified because the union would be in a better position simply relying on its certification than agreeing to the employer's contract offer. *Modern Mfg.*, above at 11; *Prentice Hall*, above.

[19] The judge found that at the May 18 session, Scott, in a ''quid pro quo'' statement, offered to accept one of his proposals if the Union agreed to another of his proposals. We find that the ''counter-proposals'' made by Scott involved positions requested by the Union, and thus we do not adopt the judge's characterization of these ''quid pro quo'' statements.

[20] *Allbritton Communications*, 271 NLRB 201, 206 (1984), enfd. 766 F.2d 812 (3d Cir. 1985), cert. denied 474 U.S. 1081 (1986).

[21] We further note that the parties met frequently during the 2-month period.

Jordan Ziprin, Esq., for the General Counsel.
Robert J. Deeny and *Rebecca A. Winterscheidt, Esqs. (Snell & Wilmer)*, of Phoenix, Arizona, for the Respondent.
Michael J. Keenan, Esq. (Ward & Keenan, Ltd.), of Phoenix, Arizona, for the Charging Party.[1]

DECISION

STATEMENT OF THE CASE

MICHAEL D. STEVENSON, Administrative Law Judge. This case was tried before me at Phoenix, Arizona, on November 1–4, 1983, January 10–13, February 8–10, and March 6–8, 1984,[2] pursuant to complaints issued by the Regional Director for the National Labor Relations Board for Region 28 on October 15, and which are based on charges filed by Arizona District Council of Carpenters, an affiliate of United Brotherhood of Carpenters and Joiners of America, AFL–CIO (Union) on August 2. The complaints allege that Sage Development Company (Case 28–CA–7039); Joe Guzman Con-

[1] Philip M. Prince, Esq., represented Respondents only for the first week of this hearing. He was replaced by Winterscheidt. Similarly, Atty. Jane Goldman assisted Ziprin for a brief period in the case, but was not replaced. Atty. Keenan was present only for a portion of the first day of hearing and did not return or otherwise publicly participate. Also, he did not submit a brief.

[2] All dates herein refer to 1982 unless otherwise indicated.

struction Co. (Case 28–CA–7040) and M & O Construction Co., Inc. (Case 28–CA–7041) (Respondents) have engaged in certain violations of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act).

Issue

The primary issue in this case is whether Respondents violated the Act by making a unilateral change in a mandatory subject of bargaining subsequent to expiration of the collective-bargaining agreement. To resolve this question, other issues need to be decided:

(1) Whether an exclusive hiring hall provision survives the expiration of the parties' previous collective-bargaining agreement.

(2) Whether the Union and Respondents reached impasse in negotiations, so that Respondents were permitted to implement their firm and final offer, including the hiring hall provisions.

(3) Whether, either or both parties bargained in bad faith, and if so, what effect on the issue of impasse.

(4) Assuming no impasse, whether the Union waived enforcement of the hiring hall provision so as to preclude a finding of unilateral change in violation of the Act.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel and Respondents.[3]

FINDINGS OF FACT

I. RESPONDENTS' BUSINESS

Respondents admit that they are Arizona corporations engaged in the framing and finishing contracting business and have their principal office and place of business located in Peoria, Arizona (Sage Development Company); Chandler, Arizona (Joe Guzman Construction Co.); and Phoenix, Arizona (M & O Construction Co., Inc.). They further admit that during the past year, in the course and conduct of their business they have purchased and received goods and materials valued in excess of $50,000 from suppliers outside the State of Arizona. Accordingly, they admit, and I find, that they are employers engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondents admit, and I find, that Arizona District Council of Carpenters, an affiliate of United Brotherhood of Carpenters and Joiners of America, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

[3] General Counsel's unopposed motion to correct the transcript is granted. The changes are reflected at Appendix 1 [omitted from publication] to this decision.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Assuming Arguendo no Impasse During Bargaining, Does the Hiring Hall Provision Survive Expiration of the Collective-Bargaining Agreement*

1. The facts

Although this threshold issue is essentially a legal issue, certain underlying facts must be presented as background. These facts are uncontested and contained within a written stipulation. (G.C. Exh. 3.)

The Respondents and the Union have been bound to successive collective-bargaining agreements, the most recent of which was effective from June 1, 1979, to May 31. (G.C. Exh. 5.) After that document expired, no succeeding agreements were entered into by the parties at any time material to the issues in this case.

The expired collective-bargaining agreement (G.C. Exh. 5) contained a provision for an exclusive hiring hall and referral arrangement covering appropriate units of carpenters employed by each of Respondents, pursuant to which each of the Respondents was required to requisition and hire their respective carpenter employees through the Union's hiring hall. Beginning from June 1 through and including September 2, each of the Respondents failed and refused to abide by the exclusive referral and hiring procedures contained in the collective-bargaining agreement (G.C. Exh. 5), and ceased to utilize the Union's hiring hall as the exclusive source for all carpenter employees to be employed by each of Respondents.[4] During the period of time referred to above, June 1 through September 2, the Union has been willing and able to refer carpenter unit employees and applicants for employment to each of the Respondents pursuant to the exclusive hiring hall provision contained in the contract which expired on May 31 (G.C. Exh. 5).

2. Analysis and conclusions

Beginning with certain basic legal provisions, I note that under the Act, ''an expired collective-bargaining agreement continues to define the status quo as to wages and working conditions, and that the employer is required to maintain that status quo . . . until the parties negotiate to a new agreement or bargain in good faith to impasse.''[5]

However, not all provisions of the collective-bargaining agreement, even if mandatory subjects of bargaining, survive the contract's expiration. To determine which provisions survive and which do not, I look first to the Board's decision in the case of *Bay Area Sealers*, 251 NLRB 89, 90 (1980), enfd. as modified 665 F.2d 970 (9th Cir. 1982), which states the applicable standards:

[4] Appendix 2 [omitted from publication] to the stipulation between the parties (G.C. Exh. 3) contains lists of names of certain of the carpenter unit employees, some or all of whom were hired by each of Respondents as indicated, from sources other than the Union's hiring hall between June 1 and September 2. It is unnecessary to include these lists in this decision.

[5] *NLRB v. Cauthorne*, 691 F.2d 1023, 1025 (D.C. Cir. 1982); *NLRB v. Carilli*, 648 F.2d 1206, 1214 (9th Cir. 1981); *Hen House Market No. 3*, 175 NLRB 596 (1969), enfd. 428 F.2d 133 (8th Cir. 1970).

> Although an employer's contractual obligations cease with the expiration of the contract, those terms and conditions established by the contract and governing the employer-employee, as opposed to the employer-union, relationship, survive the contract and present the employer with a continuing obligation to apply those terms and conditions, unless the employer gives timely notice of its intention to modify a condition of employment and . . . [unless] impasse is reached during bargaining over the proposed changes.

The issue of impasse will be covered in the next section of this decision. For now, I look first to those provisions of the contract which, in accord with the standard reflected above, do survive the contract's expiration.

In *Finger Lakes Plumbing Co.*, 253 NLRB 406 (1980), the Board held that respondent violated the Act by the cessation of payments of contractually mandated contributions for certain fringe benefits, after the contract expired. These payments, the Board held, should have been continued to the group insurance plan, pension plan, apprenticeship training and education fund, journeyman education training fund, mechanical contractors industry advancement program, vacation fund, holiday fund, and annuity fund.

Other Board cases give additional examples of provisions of the contract which survive its expiration unless impasse is reached: For example, wage rates[6] (except wage rates for strike replacements hired at a lower rate of pay after termination of a contract),[7] leave provisions,[8] vacation and holiday pay,[9] job classifications[10] and grievance and arbitration.[11] With respect to seniority provisions in an expired collective-bargaining agreement, there appears to be a conflict in Board law which need not be resolved here.[12]

Turning next to those provisions which do not survive the expiration of the contract, I note fn. 4 of the Board's decision in *Finger Lakes Plumbing Co.*, supra. There the Board cited its decision in *Peerless Roofing Co.*, 247 NLRB 500, 505–506 (1980), enfd. 641 F.2d 734 (9th Cir. 1981), for the proposition that the cessation of deductions and remission to the union, of employee union dues was not unlawful.[13] The rationale for this holding is found in an earlier case, *Bethlehem Steel*, 136 NLRB 1501, 1501–1502 (1962), enf. denied and case remanded sub nom. *Shipbuilders v. NLRB*, 320 F.2d 615 (3d Cir. 1963), cert. denied 375 U.S. 984 (1963), where the Board stated:

> We continue to believe that Respondent did not violate the Act when it ceased giving effect to the contract provisions which required employees to join the Union 30 days after hire and discontinued the checkoff of union dues. . . .
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> . . . .
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> Notwithstanding the fact that union security and checkoff are compulsory subjects of bargaining, and that Respondent acted unilaterally with respect to them, we find nothing unlawful in Respondent's action here. The acquisition and maintenance of union membership cannot be made a condition of employment except under a contract which conforms to the proviso to Section 8(a)(3). So long as such a contract is in force, the parties may, consistent with its union-security provisions, require union membership as a condition of employment. However, upon the termination of a union-security contract, the union-security provisions become inoperative and no justification remains for either party to the contract thereafter to impose union-security requirements. Consequently, when, upon expiration of its contracts with the Union, the Respondent refused to continue to require newly hired employees to join the Union after 30 days of employment, it was acting in accordance with the mandate of the Act.
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> Similar considerations prevail with respect to Respondent's refusal to continue to check off dues after the end of the contracts. The checkoff provisions in Respondent's contracts with the Union implemented the union-security provisions. The Union's right to such checkoffs in its favor, like its right to the imposition of union security, was created by the contracts and became a contractual right which continued to exist as long as the contracts remained in force.

All of the above is background to the central issue regarding whether hiring halls survive the expiration of a contract. In resolving the question, I first note that a nondiscriminatory[14] hiring hall, operated by a union is a mandatory subject of bargaining.[15] To be considered mandatory, a subject of bargaining must fall within the meaning of ''wages, hours, and other terms and conditions of employment,'' as set out in Section 8(d) of the Act.[16]

Although hiring hall provisions are mandatory subjects of bargaining, this is not sufficient by itself to make it survive the expiration of the underlying contract. Rather the test, as noted in *Bay Area Sealers*, supra, is whether the particular provision at issue affects the employer-employee relationship.

Contrary to Respondents, I hold that an exclusive hiring hall provision does affect the employer-employee relationship. An employer is provided as needed, with union-screened, presumably competent, employees. The employee is guaranteed a work environment in accord with the contract and including in particular, union wages. I fail to see how a hiring hall affects the employer-union relationship at all. Respondents cite no direct authority in support of their claim. Rather, they must argue by analogy to other cases, holding

[6] *SAC Construction Co.*, 235 NLRB 1211, 1218 (1978), affd. 603 F.2d 1155 (5th Cir. 1979).

[7] *Leveld Wholesale Inc.*, 218 NLRB 1344, 1350 (1975). This case also holds that an employer may also change unilaterally fringe benefit fund payments for strike replacements.

[8] *Seattle-First National Bank*, 270 NLRB 389 (1984).

[9] *NLRB v. General Time Corp.*, mem. 657 F.2d 271 (7th Cir. 1981); *Hi-Grade Materials Co.*, 239 NLRB 947, 956 (1978).

[10] *Edwards & Webb Construction Co.*, 207 NLRB 614, 618–619 (1973).

[11] *American Sink Top & Cabinet Co.*, 242 NLRB 408 (1979); *Digmore Equipment Engineering Co.*, 261 NLRB 1175 (1982).

[12] Compare *R. L. Sweet Lumber Co.*, 227 NLRB 1084, 1088 (1977), to *Bond Press, Inc.*, 254 NLRB 1227, 1232 (1981).

[13] See also *Trico Products Corp.*, 238 NLRB 1306, 1308 (1978).

[14] The hiring hall provision at issue in this case is nondiscriminatory. (G.C. Exh. 3, app. 1, par. A,152.1.1.)

[15] *Houston Chapter AGC*, 143 NLRB 409 (1963), enfd. 349 F.2d 449 (5th Cir. 1965), cert. denied 382 U.S. 1026 (1966); (*Houston Chapter* was cited with approval in *H. A. Artists & Associates v. Actors Equity Assn.*, 451 U.S. 704, 721 fn. 28 (1981)); See also *NLRB v. Tom Joyce Floors, Inc.*, 353 F.2d 768, 771 (9th Cir. 1965).

[16] *Houston Chapter AGC*, id. at 411. At fn. 10 of its decision in *Houston*, the Board denied any implication that its decision was limited to hiring halls in the building and construction industry. Rather, citing the Supreme Court decision in *NLRB v. Borg-Warner Corp.*, 356 U.S. 352 (1956), the Board indicated that its holding was applicable to hiring halls in all industries.

that the union checkoff and union-security provisions do not survive. (Br., p. 4.) I, too, look to other cases, and hold that the hiring hall provision is like those other provisions of contracts reflected above, which do survive the expiration of the contract. But I also look to direct legal authority to support this aspect of my decision.

I begin with the case of *Southwest Security Equipment Corp.*, 262 NLRB 665 (1982). There the administrative law judge held (at 669) that respondent violated the Act by inter alia, unilaterally discontinuing use of the hiring hall provision after the labor contract expired. In reviewing the judge's decision, the Board struck as untimely the Respondent's exceptions relating to the hiring hall provision and adopted pro forms the finding on hiring halls. On July 3, 1984, the U.S. Court of Appeals for the Ninth Circuit reversed the Board's decision to strike the respondent's exceptions as untimely. Then the court considered on its merits the issue of survival of the hiring hall provision and affirmed the Board.[17]

Additional authority in support of my decision ia provided by the case of *Sheeran v. American Commercial Lines*, 683 F.2d 970 (6th Cir. 1982). This case is an appeal from an order granting the NLRB Regional Director an injunction pursuant to Section 10(j) of the Act enjoining Respondent from, inter alia, refusing to use the union hiring halls as the exclusive source of new hires. In affirming the issuance of the injunction as to this point, the court stated (at 977):

> It is well settled that a hiring hall arrangement governing the referral and hiring of bargaining unit employees is a mandatory subject of bargaining. [Citation omitted.] The district court correctly held that appellants' refusal to use the hiring hall was not cured by termination of the contract. Terms and conditions of employment embodied in a collective bargaining agreement survive the expiration of the contract and may not be altered unilaterally without first bargaining to agreement or good faith impasse. *N.L.R.B. v. Katz*, 369 U.S. 736, 82 S.Ct. 1107, 8 L. Ed 2d 230 (1962); *N.L.R.B. v. Frontier Homes Corp.*, 371 F.2d 974, 979 (8th Cir. 1967).

In conclusion, I find that the General Counsel has established prima facie that Respondents were required, under the Act, to continue to utilize the union hiring hall, even after the contract expired. I make no finding here that the Act was violated. Respondents raise impasse and other affirmative defenses. Until it has been determined whether these affirmative defenses are applicable, any finding that the Act was violated would be premature and perhaps unnecessary. I turn now to decide these subsequent questions.[18]

[17] *NLRB v. Southwest Security Equipment Corp.*, 736 F.2d 1332 (9th Cir. (1984).

[18] At p. 4 of their brief, Respondents address an issue which I raised at hearing relative to why the hiring hall provision would survive an expired agreement when supposedly a no-strike provision would not survive, thus seeming to give the Union an unfettered right to call a strike and raising the issue of lack of mutuality. At p. 91 of his brief, the General Counsel discussed the same issue. Contrary to the parties, I find that it is not certain that the Union did have an absolute right to strike, after the contract expired, if the grievance and arbitration clause survived, and if the hiring hall provision survived. See *Ogden, Arthur & Smith, the Survival of Contract Terms Beyond the Expiration of a Collective Bargaining Agreement*, 32 Labor Law Journal, 119, 123–124 (1981). However, none of this need be decided, because as noted above, the Union did not strike and the hiring hall was fully operational for all times material to this case. It suffices to say that any alleged lack of mutuality is not an issue in this case nor a valid defense for Respondents.

B. *Did the Parties Bargain to Impasse on or Before May 31 and, if so, did Respondent Thereafter Properly Implement Changes in Use of the Union's Hiring Hall Without Violating the Act*

1. The facts[19]

a. *Background*

During the term of the Arizona State Carpenters Labor Agreement to which Respondents were bound, two developments occurred which caused Respondents' business to be affected adversely: (1) a general decline in the homebuilding industry in Arizona and elsewhere; and (2) aggressive competition from nonunion construction companies. Because most new residential and commercial construction business was obtained through a bidding procedure, the nonunion companies who had reduced labor costs had a distinct advantage over union companies with fixed labor costs. Respondents presented evidence reflecting general declines in gross revenues and reduction in market shares (R. Exhs. 13, 14, and 15). While all three Respondents had suffered substantial losses during the period of 1979–1982, Respondent Sage Development suffered greater losses than the others. At one point, Bill Butler, president of Sage, and witness at hearing, requested relief from the Union about midterm of the contract. The Union refused relief at that time, but agreed to consider new proposals during the next round of negotiations in 1982.

It had been the practice of Respondents and certain other contractors to become signatories to the Associated General Contractors Master Labor Agreement subsequent to the AGC and the District Council of Carpenters reaching agreement. The subsequent adoption by Respondents is sometimes called a ''me too'' agreement, a procedure particularly common in the construction industry.

In light of the above, it is not surprising that in mid-February, representatives of the three Respondents and two other companies, Erickson Construction Co., Inc., and Marquess Construction met with Robert L. Scott at the latter's office. Scott was vice president of the Arizona Employer's Council, Inc., and an experienced management labor consultant and negotiator. Among those present for the contractors were Dick Owens (M & O), Bill Butler (Sage), Slattery & Guzman (Guzman), and Erickson (Erickson). All contractors were at this meeting to explore the possibility of having Scott represent them, allegedly as individuals and not as part of a multiemployer bargaining group, to negotiate new agreements with the Union subsequent to May 31. Preliminary discussions were held at this first meeting and Scott explained the procedures involved. For example, Scott would negotiate with the Union in good faith and attempt to reach agreement. For their part, the contractors were emphatic in emphasizing their need for concessions from the Union in

[19] Both sides accuse the other of bargaining in bad faith. Although impasse includes other factors, as reflected in the ''Analysis and Conclusions'' below, the good or bad faith of the parties is the primary ingredient of impasse. Accordingly, with a focus at this time on Respondents, I have drafted the facts essentially to address the good or bad faith of the parties. Other relevant facts will be included as necessary to decide the question of impasse. To facilitate the discussion I have divided the facts into two parts: Respondents' behavior away from the table, and Respondents' behavior at the bargaining table.

order to improve their financial and competitive positions. This would have to occur on or before May 31 since the contractors told Scott they could not afford to give any extensions of the expiring contract. After the first meeting with Scott, the five contractors took about 2 weeks to consider their respective positions. Then, in late February or early March, they returned to Scott's office for a second meeting. At this time, all five contractors executed authorizations for Scott to represent them. Scott in turn, notified the Union in writing of his newly designated role. There followed eight negotiating sessions, which, because of allegations of mutual bad faith, must be covered in detail. However, while these sessions were occurring, certain other events, so-called ''away from the table conduct,'' were also occurring. General Counsel alleges that the sum total of conduct by Respondents' agents at the table and away from it will show bad faith and surface bargaining. Such a finding, if made, would refute the claim of Respondents that on or before May 31, an impasse between the parties occurred as to permit the Respondents to abandon use of the Union's hiring hall procedures.

b. *Respondents' conduct away from the bargaining table*

(1) Respondent Guzman

I find no relevant evidence of any, away from the bargaining table conduct directly relating to Guzman.

(2) Respondent M & O Construction

(a) *Dessie Kist.* An employee of M & O for about 17 years and a foreman since 1969, Kist testified to a conversation he had with Chuck Carroll, M & O's general superintendent over rough framing. In early April, according to Kist, Carroll told him privately that M & O was going nonunion and that if Kist wanted to stay union, he should start thinking about trying to relocate himself. Kist further stated that Carroll said he was giving the information to Kist as a friend. In fact, the two men had known each other for about 17 years. In his testimony, Carroll admitted making the remarks in question, but stated that he was expressing his personal opinion only. He denied giving the message to anyone else and there is no evidence that he did so.

A few days later, Carroll asked Kist if the latter had made up his mind yet, about going union or nonunion. Kist said he was going to stay union, but would remain on the job until the union agents chased him off.

Kist also testified to certain statements made to him by Henry Zanin Sr., vice president of Precision Components Inc. (PCI)[20] and like Carroll, a longtime friend and associate. In early May, Kist testified that Zanin Sr. stated that nonunion companies were eating them up and that they had to go nonunion to stay in business. Zanin Sr. then asked Kist whether he would go nonunion or stay union. Zanin recalled the conversation, but denied saying what Kist had stated. I credit Kist on this point and find him to be more credible.

On May 28, Kist had a second conversation with Zanin Sr. At this time, Zanin Sr. called Kist over to his truck and said that as of June 1, you will be working under M & O's contract, not the Union's contract. Then Zanin Sr. handed Kist a document purporting to be the new contract. Zanin again admitted having a conversation with Kist at the time and place in question, but denies the content as given by Kist. Again I credit the latter's version.

On May 19, Kist had attended an informal M & O foreman's meeting which he had learned about from Bill Dankworth, a second M & O general superintendent whose position was equivalent to that of Carroll.[21] At this meeting, the foremen discussed their options, depending on whether the company stayed union or went nonunion. The following day, Dick Owens, president of M & O, drove up to the jobsite where Kist was working. Owens called Kist over to his truck and asked him what the hell he was doing. Then Owens asked Kist whether he attended the foreman's meeting the night before. Kist admitted that he had, but that he had not organized it. Up to this point the two witnesses essentially agree. However, Owens denied making the next statement attributed to him by Kist: that M & O was going nonunion even if Owens had to close its doors and come out with a different name. Again I credit Kist and note that PCI, a lumber company affiliated with M & O, had remained nonunion.[22]

(b) *James Vandal.* This witness was a foreman who worked for M & O from 1979 to August. He testified to certain conversations he had with Lloyd Cranton, M & O's superintendent of trim. In April, this witness was told by Cranton that one of these days soon you're probably going to have to make a decision, because the Company is probably going nonunion. About a month later, at the same location, Cranton again asked Vandal whether he planned to go nonunion because the Company probably was going nonunion. Cranton responded that he would interpret Vandal's answer as a ''no,'' and he then made a notation in a small notebook.[23]

On May 25, Cranton told Vandal that if any nonunion men come on the job looking for work, take their phone numbers and give them to Cranton, because M & O would be needing help next Monday. At some point prior to May 31, Vandal called Cranton to say falsely that he would stay with the company. He did this to keep Cranton off guard.

According to Vandal, in late May, he called Owens to ask him why he was going nonunion. Allegedly Owens told Vandal that the pension and health and welfare costs were too high. Further, Owens stated that employees don't receive a pension until they are 60 years old and 30 percent don't see it anyway. I note that Vandal's affidavit doesn't contain the conversation between Vandal and Owens. Further, Owens denied even knowing Vandal as well as ever receiving a phone call from him.

Notwithstanding the above factors, I credit Vandal's statement here. During the first 6 months of 1982, M & O had only between 90–110 total employees. There were far fewer

[20] PCI and M & O were interrelated businesses. The nature of the relationship will be more fully disclosed below.

[21] Dankworth was one of a few persons—a very few—whose name was frequently mentioned in this case, but who never testified. At one point, Respondents' counsel indicated that Dankworth would be testifying. (R. 2324.) No reason was ever given for this apparent change in plans.

[22] Further, when asked whether he made the statement in question, Owens replied with less than a sweeping denial, ''I don't believe I did, no.'' (R. 2646.)

[23] Several witnesses referred to Cranton writing in a small notebook after talking to them about their intentions regarding M & O. The book was never produced at hearing.

foremen and Vandal was one. I can't believe that Owens wouldn't know his own foreman, even though Vandal only worked for about 3 years. Moreover, what Owens told Vandal was the identical message Scott was conveying to the union negotiators at about the same time. This was M & O's public position. Finally, Owens' message to Vandal was consistent with what he told Kist as found above.

Finally, Vandal testified to a conversation that he had with Henry Zanin Jr., who never testified in this case. Zanin Jr., worked for the witness as a trimmer and allegedly made certain statements to Vandal. Allegedly, Zanin Sr. had told his son that his dad and Dick Owens were against the Union and would never sign a contract with the Union. I do not credit this evidence and find it is entitled to no weight. Zanin Jr. is not an agent of M & O and PCI is not a respondent in the case. Further, whatever Zanin Sr.'s view of the Union was, it is not relevant to any issue in this case.

(c) *John Ritchie.* An employee of M & O for about 19 years at the time of hearing, this witness testified to a conversation he had with Lloyd Cranton in late May. Ritchie was then a candidate for union office and handed Cranton a business card, asking for his vote. Cranton refused the card, saying that he would not be voting, because the company would probably be going nonunion. Cranton went on to say that about 80 percent of the employees had agreed to go nonunion. Ritchie replied that he intended to stay union. Cranton admitted the essence of the remarks attributed to him, differing only on immaterial details.

Shortly before the contract expired, Ritchie was told by an unidentified M & O foreman that anyone not prepared to go nonunion should turn in their equipment the next day. Ritchie had a pickup truck and some tools. That evening Cranton called him at home and apologized for any misunderstanding. After a lengthy conversation to the effect that Cranton was only following orders, he told Ritchie to keep the equipment as the turn-in order had been rescinded.

(d) *Gene Yockum.* This witness was a pickup carpenter for M & O for 6 years, leaving May 28. His immediate supervisor was Bill Dankworth. About April 30, Dankworth asked Yockum to look at a proposal which he then handed to him. Dankworth said he had heard that Henry Zanin Sr. was coming out to the site and they should be careful with what they said, because Dankworth had heard that Zanin Sr. might fire anyone seen walking picket duty. At this time, or at a later conversation, Dankworth said he hated to see the Company go nonunion.

In mid-May, Dankworth talked to Yockum again with reference to another proposal. This time, Dankworth pointed out, there would be no more pension, hospital, or dental insurance. Dankworth also said that Zanin Sr. was the big instigator of the move to nonunion status, and there was no way that Zanin Sr. would sign a contract with the Union.

I credit Yockum's testimony here, but assign it little or no weight. Dankworth never testified, but Yockum's testimony is nothing more than vague hearsay regarding Zanin Sr. I find it contributes nothing to General Counsel's case. Yockum also testified to certain direct conversations between himself and Zanin Sr. to which I now turn.

The parties stipulated that during 1979, 1981, and 1982, Zanin Sr. was vice president and member of the board of directors of PCI. M & O is a wholly owned subsidiary of PCI. And, at all times material to this case, Zanin Sr. was an agent and representative of M & O. Further, for the years 1980, 1981, and 1982, Zanin Sr. was vice president of M & O and a member of the board of directors of M & O (R. 1131–1132). During 1982, Dick Owens and Henry Zanin Sr. were owners of 7290 shares and 1042 shares respectively in PCI. (R. 1581–1182.)[24]

Shortly after the conversation with Dankworth, Zanin Sr. told Yockum that the company was losing a lot of work, about one-third of it, and only about 30 percent of the carpenters would ever get a pension. Yockum responded that the change wouldn't affect him since he'd already decided to move away from the area, but he was concerned about the other men.

Zanin Sr. and Yockum had known each other since grade school and been friends over the years. Zanin Sr. denied making the remarks attributed to him by Yockum, but did testify that he told Yockum, ''We've made an offer and they haven't come back with anything yet.'' I credit Yockum's testimony here. Given the close relationship between the two men over the years, and the fact that Yockum had already decided to leave the area irrespective of how the contract issue was settled, there was no reason for him to fabricate his testimony. Moreover, this testimony was consistent with that attributed to Dick Owens by other witnesses. Finally, Respondents attack Yockum because he was uncertain about the position held by Zanin Sr. in M & O. It is clear that Yockum and others such as Dankworth knew that Zanin Sr. was an officer, owner, or high official of M & O. In the context of the relationship between PCI and M & O, it is of no consequence whatsoever, that Yockum was not privy to the exact details of the corporate relationship.

(e) *Lester Kist.* Unlike most other employees, Kist had worked for M & O as an independent contractor, doing work as a nailer. On May 10, Dankworth asked the witness whether he was going nonunion with the Company after June 1. The witness answered that he was not sure. Dankworth replied that Kist better make up his mind, because he didn't have too much time left. Then Dankworth referred to another nailer named Mike, who was nonunion, saying that, ''We'll have at least one nailer left, then you can come out and picket, Mike.''

I credit Kist's testimony and will evaluate it with that of other witnesses below.

(f) *Frank Minutolo.* This witness was an admitted supervisor and agent of M & O. (R. 55–56.) On May 3, Cranton told Minutolo that the former would give him 3 weeks to make a decision to go nonunion or stay union. Then Cranton showed Minutolo an M & O contract proposal and stated this was that Company's latest proposal and if the Union didn't accept it, then the Company was going nonunion. On May 27, Cranton announced that it was ''decision time.'' When Minutolo stated he was staying union, Cranton said ''O.K.,'' made a mark in his notebook, and left the area in his truck. The following day the witness talked to Cranton again. Cranton stated the Union wouldn't agree to the Company's proposal and the Company was going nonunion. Minutolo told his crew that they would have to make up their own mind to go nonunion or stay union.

[24] Both men also had their sons on the payrolls of PCI, M & O, or both at different times doing carpentry work. However, as sons of bosses, they were not subject to the same rules and regulations as other employees (R. 1579–1585).

I credit Minutolo's testimony and find that it was not seriously contested. Cranton testified that he was doing no more than attempting to ascertain who would be working after May 31, when a new contract had not been agreed to. In fact, Minutolo and many others continued to work until January 1983, when there was a brief strike.

(g) *Lynn Nelson.* This witness worked for M & O as a leadman and Foreman for 8 years, leaving the Company about 6 months before the hearing. In mid-April, the witness talked to his superintendent, Cranton, who stated the Company would be going nonunion and that Nelson would have to make up his mind about turning in equipment and other matter. Nelson conveyed Cranton's remark to his crew. A few days later, pursuant to instruction from Union Business Agent Mills, Nelson told Cranton that he would be staying with the Company.

I credit Nelson's testimony except that portion dealing with an alleged remark of Cranton's that Nelson would not have a job if he stayed union. This alleged statement was not in Nelson's affidavit. Further, it does not follow the pattern of other witnesses relating what Cranton said. Finally, in subsequent testimony of Nelson's relating to hiring away from the union hiring hall, Nelson contradicted himself several times. I am inclined to credit his testimony only to the extent he is corroborated by other witnesses who have testified to conversations with Cranton, and that is exactly what I have done.

(h) *Floyd Arendell.* He worked for M & O about 8 years as a carpenter and for all times material to this case, was a union steward. Arendell's foreman was Chuck Ringele. Beginning in April, Ringele said that M & O was going nonunion. This statement was repeated on two other occasions. The witness made no reply. On May 19, Ringele raised the subject again by telling Arendell and others that he would require them all to make a decision in a few days, union or nonunion. For any electing to stay union, they would be laid off a few days later. When Arendell asked a few questions about a new insurance plan that M & O was offering, and about some other carpenters at Sun City who went nonunion, but remained on a layoff status, Ringele became annoyed and told Arendell that he was a good union man and should stay that way.

A few days after this conversation with Ringele, Arendell's pay was cut by 50 cents per hour. He had been receiving 50 cents over scale because he was a good worker. Ringele testified that everyone being paid over scale had his wages cut back to scale and this included Ringele, himself, who was reduced 25 cents per hour. Later in the hearing, M & O payroll records were produced. These records showed Arendell's pay was cut on May 19, and every other affected employee's pay was cut on June 30. Ringele, like all M & O foreman, had complete authority to pay over union scale, but foremen could not pay less than union scale.

On June 17 or 18, Ringele fired Arendell because, according to the foreman, Arendell was foot-dragging on the job. Arendell explained that he was working slow because he was training a new employee who was nonunion. The following day Arendell returned to the jobsite to ask Ringele for a letter of recommendation. Ringele agreed to this, and allegedly added, ''We shouldn't have butted heads over the union deal.'' Further, Ringele added that Greer—another employee whose testimony at hearing will be reported below—better watch his step or he'll be laid off too. Then Ringele added that Dick Owens would definitely not sign a contract with the Union.

Ringele denied all of the postfiring conversation with Arendell. However, I credit Arendell here and throughout. Again General Counsel has presented several witnesses to various conversations with Ringele who are consistent with each other and demonstrate a pattern of behavior.[25]

One other aspect of Arendell's testimony needs to be covered briefly. This relates to certain work which Arendell, Greer, Todd Nelson, and other nonwitnesses, Resse Davis, Craig Alapan, and possibly others did for Ringele. On a nonworkday, 150 miles from Phoenix, Ringele was building a cabin for himself. Members of his crew had volunteered to work on this cabin and were paid union scale by Ringele, out of his personal funds. In the course of the day, Ringele indicated that he had spoken to Dick Owens, who had said that he was not going to make any changes in the Company's contract proposals and that Owens knew the Union would not accept any part of the contract.

I credit the witnesses, Arendell, T. Nelson, and Greer, who testified to this conversation and discredit the denials of Ringele. While I agree that Ringele was acting outside the scope of his authority as foreman, I nevertheless also find that the scope of his authority is not in issue, nor is any authority in issue. In the statements which I find Ringele to have made, he was telling the other employees what Owens had said and again this is consistent with other statements which I have found Owens to have made, above, to Dessie Kist for example.

(i) *Todd Nelson.* This witness was also a subordinate of Ringele and worked as an M & O carpenter from 1978 to 1983. The testimony of T. Nelson generally tracked that of Arendell and other witnesses. He specifically recalled Ringele telling employees on a Wednesday in late May that Ringele would be back on the following Friday and that anyone electing to stay with the Union would get their checks right then. Subsequently, Arendell, Greer, and other union supporters were later laid off. T. Nelson told Ringele that he would go nonunion.

(j) *Gerald Greer.* He formerly worked for M & O as a carpenter for 5 years, and his foreman was Ringele. Greer testified to the conversation with Ringele at the latter's cabin. His conversation is essentially as reported for Arendell, above, and need not be repeated. Greer's account of the May 19 conversation between Ringele and Arendell also is consistent with the latter's testimony.

In mid-June, Ringele had certain conversations with Greer who was subsequently laid off. I agree with Respondents (Br., p. 134) that these conversations are irrelevant to the issue of impasse on or before June 1.[26]

(k) *David Delavara.* This witness was first hired in March and was assigned to work with Foreman Ringele. Delavara

[25] After he was terminated by Ringele, Arendell and three others, whose testimony will be reported below, Gerald Greer, Floyd Skaggs, and David Delavara were the subjects of a settlement agreement (G.C. Exh. 7(b)) under which the employees were offered immediate reinstatement. This agreement contained the standard nonadmission clause.

[26] To a degree, Greer is in the same category as Arendell. As noted above, all were reinstated pursuant to a settlement agreement. At the risk of appearing inconsistent, I find that it is unnecessary to recite in detail the post-June 1 conversations between Greer and Ringele since there is little or no additional probative value beyond that reflected in the summary of Arendell's testimony.

was hired at the same time as Floyd Skaggs (summarized below). Both were told there was 3–4 months of work left on the job. Both were laid off in mid-June.

On May 19, Delavara was a party to the remarks made by Ringele as reported above. On the same day, Ringele referred to Arendell and a few others as ''hotheads'' and stated they were strictly union.

(l) *Floyd Skaggs.* In April, Skaggs and T. Nelson were doing some carpentry work on a roof when Ringele stated that there was a possibility that M & O would be going nonunion at the end of May. Ringele inquired what Skaggs would do. The witness replied that he would play the matter by ear. Then, toward the end of May, Ringele said that M & O was going nonunion at the end of the month. Ringele again asked what the witness would do, so he wouldn't be without a crew at the end of the month. Skaggs repeated the same answer he gave before. When Skaggs was laid off, he noted that many nonunion employees on the job hired after him, were still working.

Ringele testified that Skaggs was a poor worker who had taken too many days off. More specifically, he had asked Ringele for a week off for family matters, but Ringele received information that Skaggs had lied to him. There was evidence of personal animosity between Skaggs and Ringele, but all relevant testimony given by the former is corroborated by other witnesses. I credit the testimony of Skaggs.

(m) *Billy Green.* After working for M & O as a carpenter for about 3 years, this witness quit his job in April. Shortly before he left, Green had a conversation with an M & O foreman named Lindsey, who did not testify. Lindsey spoke to Green and other employees during a lunchbreak and read what he described as the Company's proposal to the Union, making favorable comments on certain features of the proposal such as ''good insurance.'' Allegedly, Lindsey further added that the Union was going down and wouldn't be around too much anymore. The latter statement was not contained in a written statement which Green had immediately provided to the Union. I don't credit it. All other testimony is credited since it is part of the pattern of conduct by many M & O foremen and supervisors.

(n) *Alan Gray.* This witness worked for M & O as an apprentice carpenter between 1979–1982. He knew Dick Owens' son, Kevin, from work and from social occasions. The witness could remember virtually nothing about relevant events. I admitted his affidavit into evidence as post-recollection recorded (G.C. Exh. 11). I have decided to credit none of the affidavit. Kevin Owens denied making the statements attributed to him and I believe his testimony. I further note that Kevin Owens was 26 years old at the time of hearing. In sum, I will not consider the evidence provided by Gray at all.[27]

(o) *Richard Mills.* A lengthy witness at hearing, Mills was an assistant business representative for Local 906. He was one of three negotiators for the Union, along with Cardinal and Martin, and I will be referring to his testimony frequently. In general, I found Mills to be a highly credible witness. I was particularly impressed at one point in his testimony where he described how he immediately quit his job, when he perceived that union leadership was attempting to restrain him from policing the hiring hall provision of the contract against Kevin Owens. Apparently Dick Owens had complained, contending that his son should be held to a different standard than his other employees. In any event, the dispute between Mills and his superiors was soon resolved and the time he was off the job was construed by mutual agreement, to be vacation time.

While in the middle of negotiations with the Employers' representative, Mills received a call from Superintendent Cranton, who was concerned about losing his pension if he worked for a nonunion contractor. In the course of that conversation, Cranton said, ''I'm sure if you guys don't accept his proposal on what they want, that they're going to go nonunion.'' (R. 2175.)

In another series of conversations with Superintendent Dankworth, who was also a member of the Union, the latter said in February or March, that negotiations didn't look very good. When Mills asked Dankworth who was responsible for questioning employees about their plan in the event that M & O went nonunion, Dankworth blamed Carroll, his superior. Reference was also made by Dankworth to Zanin Sr. who was out in the field talking to employees in a coercive way.

(3) Respondent Sage Development Company

(a) *Richard Mills* (cont.). One aspect of his testimony concerns a dispute between Bill Butler, owner of Sage, and the Union over the former's pension. Ultimately, the matter would involve Mike Butler, Bill's brother, and owner, with his wife, of 10 percent of Sage. Here's what happened:

In July 1979, the Union called a meeting at Hunter's Inn, a Phoenix restaurant, to discuss the Employer's alleged hiring hall violations. Among the persons attending were Mills and Bill Butler. Butler told Mills that he didn't want to continue paying into the pension fund, which was administered through a union trust, but desired to have the money returned to him. Fearing that some red tape might be involved, Butler asked Mills to intervene with union officials to expedite the matter. Mills did make an initial effort, but this proved to be unsuccessful.

In October 1981, the subject was raised again in a conversation between Mike Butler and Mills at a jobsite. Mike Butler said the Union had screwed his brother out of his pension and that his brother wouldn't sign another agreement unless he received his pension funds. In a telephone conversation with Mills prior to a Christmas party in 1981, Mike Butler raised the issue of the pension again. When Mills stated he had talked to union trustees, and that the delay was caused by the management trustees, Mike Butler and his brother didn't believe Mills was working hard enough to get his pension moneys. In late 1981 or early 1982, Bill Butler reiterated his brother's remarks to Mills, saying, ''I don't see why I should ever want to sign another agreement when you guys are screwing me out of my pension.''

Bill Butler denied making the remarks attributed to him, although he did admit to asking for Mills' help in getting his pension. According to Butler, he received a pension refund of $7000, about 3–6 months after asking Mills for help. Later in his testimony, he said he received his pension in August or September. Butler could not recall whether he framed his

[27] Allegedly, Kevin Owens said he needed to get his contractor's license because M & O was going to fade out due to the union contract, and Kevin's father was going to build another company under Kevin's name. General Counsel contends that the statement to Gray was similar to that made by Dick Owens to Kist (Br., p. 33). This may be so, but the similarity is not enough to credit the evidence.

check upon receipt. He was very satisfied with Mills' help and thanked him for it. Bill Butler later testified that he had a personal friend of his, who was an attorney, look into the pension matter for him. Like his brother, Mike Butler denied the remarks attributed to him by Mills regarding his brother's anger at not receiving timely his pension funds.

I credit Mills on this issue and find that both Butler brothers made the remarks attributed to them. Bill Butler was particularly inconsistent and evasive here. For example, why would he ask an attorney to look into the matter if he was so satisfied with Mills' performance.

Mills also testified to a conversation he had with James Gentry, a Sage superintendent for 7 years. In early to mid-May, at a jobsite and in the presence of a Sage foreman named Bob Weybright, Gentry complained first about a matter of another contractor doing Sage work. Later, Gentry said Bill (Butler) was pretty serious this time about what he was going to do. That is, Butler wasn't going to be left hanging out there if those other guys didn't sign an agreement, and then he'd be out of business. Gentry went on to say that Sage had to have some concessions. Finally, Gentry said if Bill didn't think he got what he needed, then he'd go nonunion. In his testimony, Gentry denied ever telling anyone that Sage was going nonunion. The foreman, Weybright, was not called. I credit Mills here, finding that Gentry denied something other than what Mills attributed to him.

Mills also testified to a conversation with Tom Friedman, who was stipulated to be a Sage supervisor (R. 353). On May 12, Mills and an associate named William Martin talked to Friedman, then working on a roof at a jobsite. Mills was checking out a rumor that Friedman would be getting a special deal from Butler with higher wages and a separate contract if he, Friedman, would stay and go nonunion with Sage. Friedman admitted this was so and asked Mills how he found out about this.

Friedman testified that he had been a Sage foreman for about 6 years. He admitted talking to Mills while working on a roof but denied the conversation as reported by Mills. According to Friedman, he stated he didn't know if he would stay union or go nonunion. However, he also said that he may have mentioned something about a deal with Butler that would exceed his present hourly rate. I again credit Mills, finding him more credible.

(b) *Jeffrey Hanauer.* This witness worked for Sage for a total time of 6-1/2 years, leaving in June 1983. For the last 3-1/2 years, he was a carpenter foreman. Hanauer testified to conversations with both Bill and Mike Butler at different times. In early May, Mike Butler told him that he felt Sage was going nonunion, and he was glad about this because he would no longer have to deal with a particular business agent.

In earlier conversations in January, Bill Butler required all foremen to take a $1-per-hour wage cut for 3 months. Hanauer was angered because Butler had stated that Sage's superintendents would also have their wages cut, but this didn't occur. According to Hanauer, Butler said Sage could not be competitive as a union company and he was considering an option of going nonunion. However, Butler also stated he would sign a contract if the Union came up with options that he could work with.

In his testimony, Mike Butler described Hanauer as a good friend and a worker skilled enough that Hanauer made cabinets for Mike Butler's home. Butler denied making the remarks attributed to him by Hanauer. Similarly, Bill Butler denied the Hanauer conversation. According to Bill Butler, he said that Sage couldn't get any work because they were getting under bid so bad. As to Hanauer's additional testimony that while work was slow in January or February, the work picked up so that 50 to 60 men were put on by June, even without union concessions, this testimony was not contradicted by either Butler brother.

I am caution in evaluating Hanauer's testimony because he felt that he had been treated unfairly by Sage in that superintendents allegedly never took the temporary pay cut. On balance, however, considering both demeanor and substance, and to the extent corroborated by other witnesses, I find Hanauer the more credible and I credit his testimony.

(c) *Ronnie Baker.* An experienced carpenter for about 16 years, Baker began working for Sage on June 1. He soon noticed a number of nonunion carpenters on the job and asked his foreman, Tom Friedman, for an explanation. Friedman stated he thought the Company was going nonunion. On or about June 2, Baker reported for work with a union referral slip. Friedman, who had hired Baker, objected to this saying that he, Friedman, had not told him to get a referral. Later that day Friedman reiterated that the Company was going nonunion for sure. On June 4, Baker quit his job, having previously told Friedman that he wouldn't go nonunion.

Friedman denied making the remarks in question to Baker. However, no explanation was given for Baker quitting a job 4 days after being hired. I credit Baker's testimony. While it occurred subsequent to June 1, I find it has sufficient probative value to be considered in this case.

(d) *Don Couch.* This witness was a trim foreman for Sage from December 1978 to January 1983. In May, he had a conversation with Mike Butler at a local restaurant. Butler asked him what he would do if Sage didn't sign a contract with the Union. The witness said he would stay with the Union and Butler replied that he thought that was the case.

Later the same day, Couch talked to Bill Butler, who wondered if Couch had done any thinking about staying union or going nonunion. Couch replied that if Sage didn't sign a contract, he would quit and work somewhere else. Couch explained his position to Butler, that it was not the money or benefits, but rather the principles, how he was raised. Not satisfied, Butler then asked what it would take for Couch to go nonunion, some kind of contract or job security. Couch replied that he just couldn't do it, no way.

I credit Couch's testimony. His devotion to the Union approaches religious fervor, and it is very unlikely he would fabricate his testimony. Neither Butler made credible denials and Couch's testimony is consistent with those of other Sage witnesses offered by the General Counsel.

c. *Respondents' conduct at the bargaining table*

(1) Additional background

Scott testified to the Respondents' version of events at the eight bargaining sessions. For the Union, Vince Cardinal was the primary negotiator and primary witness as to what occurred at these sessions. Cardinal was assisted by William

Martin and Richard Mills.[28] Martin's role at the sessions was to take minutes. His minutes for the first session were found to be unreliable and rejected. Minutes for the other seven sessions were received into evidence.

After Scott received executed authorizations from the five contractors, he prepared a draft of his first proposal (R. Exh. 1). He circulated this to his clients and they approved it at a meeting on or about March 15. The substance of the first Employers' proposal was based on what the employees had told Scott they needed. On or about the same date Scott gave notice to John F. Greene, district council executive secretary, of his assignment. The letter reads as follows:

> Mr. John F. Greene
> Executive Secretary
> Arizona State District
> Council of Carpenters
> 2629 West Orangewood
> Phoenix, Arizona 85021
>
> Re: Collective Bargaining
>
> Dear Mr. Greene:
>
> The following named contractors, all of whom have notified you of their intent to terminate their collective bargaining agreement, have asked the Arizona Employers' Council, Inc. to represent their interests in negotiating a new agreement:
>
> Erickson Construction Company, Inc.
> Joe Guzman Construction Company
> Marquess Construction Company, Inc.
> M & O Construction
> Sage Development
>
> I have been designated the individual of the Council to handle this matter.
>
> These contractors are not willing to be bound by any agreement reached by any firm other than their individual entity, however, there are many provisions which I am sure would be agreeable to all. In that light, I have been working with each contractor and have prepared one proposal acceptable to all.
>
> Since these contractors are interested in reaching an agreement specifically applicable to framing and finishing rather than ''me-tooing'' the basic crafts carpenter agreement, I would suggest we begin bargaining as soon as possible. I will be prepared to submit a complete proposal at the first meeting.
>
> Please call me at your earliest convenience to arrange a meeting schedule.
>
> Very truly yours,
>
> /s/ Robert L. Scott, Jr.
> Representative
>
> RLS/ddb
> [R. Exh. 6.]

[28] In order to avoid cumulative and repetitious testimony, I directed General Counsel at hearing to select his best witness to cover the Union's theory of negotiations. The other two were to cover negotiations only to the extent the evidence was contested by Respondents. Respondents frequently compare the testimony of Cardinal to Martin's minutes in attacking Cardinal's credibility. However, Scott was called back on surrebuttal with every opportunity to specifically deny Cardinal's testimony. In some cases he did; in most cases he did not. It should also be noted that there were, on occasion, additional union representatives at various sessions. However, they played no role in this case.

Greene replied about a week later:

> March 24, 1982
> Arizona Employer's Council, Inc.
> 1820 North Seventh Street
> Phoenix, AZ 85006
>
> Re: Collective Bargaining of;
> Erickson Construction Company, Inc.
> Joe Guzman Construction Company
> Murzuess [sic] Construction Company, Inc.
> M & O Construction
> Sage Development
>
> Gentlemen:
>
> This will acknowledge receipt of your letter seeking to withdraw from the multi-employer bargaining unit and to engage in separate bargaining toward an agreement to succeed the Arizona State Carpenters Labor Agreement, which expires on May 31, 1982. Your letter is being referred to our negotiating committee and to our attorney.
>
> Should it be determined that the letter is timely, and that it complies in all other respects with the labor agreement and with Federal law, we will be happy to commence separate bargaining toward a new collective bargaining agreement at an appropriate time.
>
> We will be back in touch with you as soon as possible to clarify the Arizona State District Council of Carpenters' position in this matter and to schedule future meeting dates.
>
> Sincerely,
>
> /s/ John F. Greene
> Executive Secretary-Treasurer
>
> pm
> opeiu #56
> afl-cio
>
> [R. Exh. 7.]

This exchange of letters led to Scott calling Greene to explain problems with nonunion competition. Shortly after this call, Cardinal called Scott and arranged for a meeting on March 31, to which I now turn.

(2) The negotiating sessions

(a) *March 31 session (Employers' council office)*

Scott began by introducing himself to the union negotiators and by explaining that the framers needed relief, because the nonunion competition was hurting them. He explained further that a new agreement needed to be reached not later than June 1, due to the dire economic conditions of the framers. He then presented the framers' initial proposal to the Union describing the document as a ''nonunion-union'' proposal. Scott testified that he used the term ''union/nonunion'' proposal, by which term he meant a proposal drafted to permit the framers to compete with nonunion competition. Scott also characterized his proposal as having ''no fat.'' By this he explained in his testimony he meant an honest proposal not loaded with provisions to be discarded later. As to an economic package, Scott, didn't want to haggle with the Union; rather he wanted to put his best offer up front and find out whether the Union wanted to sign the

contract. (R. 1306) Finally, Scott told the union negotiators that each of the Employers he represented retained the right to withdraw from the negotiations so long as he did so before an offer was put on the table.

By comparison to the prior contract, Scott had proposed the following material changes in his proposal (R. Exh. l):

(1) Abolish pension plan;

(2) Change the former health and welfare plan, which covered dependents, to a different plan which eliminated dependent coverage;[29]

(3) Change the hiring hall provision in two respects:

(a) From mandatory to voluntary;

(b) Time limitation for the Union to furnish requested employees from 48 hours to 24 hours;

(4) Add subcontracting provision which reads in pertinent part: ''The contractor agrees to subcontract work covered by this Agreement only when it is considered [by the contractor] economically beneficial to do so'';[30]

(5) Change no-strike-no-lookout clause from one containing seven exceptions to no-strike-no-lockout with no exceptions;

(6) Change grievance and arbitration clause in several respects;

(7) Abolish all double time for overtime work and pay 1-1/2 times regular rate;

(8) Add break time solely at discretion of employer. (The former contract contained no provision for break time at all);

(9) Abolish Sundays as a holiday;

(10) Change practice of paying laid off or terminated employee on the spot to pay within three working days;[31]

(11) Change pay scale so that individual employees could negotiate temporary lower rates of pay with employer during slow periods in lieu of layoffs;

(12) Change authority of Employer to permit the requiring of a physical examination at Employer's expense and the signing of forms to fulfill the requirements of employment practices and procedures;

(13) Change wage rates and classifications so that the prior classification of journeyman carpenter was divided into three classifications—with journeyman I the highest paid. Each Employer retained the right to determine unilaterally at what level a journeyman would be classified. To be a journeyman III carpenter, the lowest, an employee must be at least 25 years old. Under the old contract, the single classification of journeyman received $12.93-1/2 an hour; under the first Scott proposal, the rates were as follows:

	6/1/82	*6/1/83*	*6/1/84*
Class I	13.00	13.90	14.85
Class I	11.70	12.51	13.36
Class III	10.40	11.12	11.88

[29] In reply to Cardinal's complaint that maternity benefits were important for dependents, Scott replied that this didn't matter to him as he was beyond that age.

[30] There was testimony that Scott had explained to Cardinal that notwithstanding the virtually unlimited breadth of the provision, the framers only wished to utilize the clause in repair work, remodeling work, nailing and trim work.

[31] This change would be in accord with Arizona state law.

The Union objected to all or most of the proposal offered by Scott, but promised to study the provisions further and have a counterproposal at the next meeting. Cardinal agreed to arrange for the next meeting, but did not do so until mid-April. Then, the second meeting could not be arranged until April 26. In a telephone call complaining about the delay, Scott read to Cardinal, a letter which had been composed but not sent. Cardinal gave three reasons for the delay: study of the Scott proposal; preparation of a counterproposal; and involvement in other negotiations.

(b) *April 26 (Employers' council office)*

Cardinal presented a counterproposal to Scott's earlier proposal and stated, ''This is our union proposal to counter your nonunion proposal.'' (R. Exh. 5.) Scott quickly looked through the document and ascertained that it was essentially the former contract, which Scott had stated at the prior meeting, was no longer acceptable to his clients. No wage rates, nor any other economic items were proposed. During this meeting, Scott proposed that a Federal mediator be called in. Cardinal objected, saying that it was too early in negotiations to do this. Although many issues such as break periods (Union wanted two mandatory rest breaks), grievance and arbitration, and other areas were discussed, no agreement was reached.

(c) *May 3 (District Council offices)*

The prior proposals of each side were discussed with essentially the same results as before; to wit, no agreement. At one point, early in the session, Scott stated that we are so far apart, it's ridiculous to continue. Then, Scott continued to bargain. Scott requested the Union's economic proposal, but Cardinal desired to agree on the language of the contract first. Again, grievance and arbitration was discussed and Scott offered to arrange for expedited processing. The hiring hall issue was discussed and Scott said under the old contract, some of the union referrals were unqualified. Scott also objected to any mandatory breaktime. As to Sundays, the Union objected to allowing its member to work on a voluntary basis on that day, since it believed Sunday was time for men to be with their families. Scott reiterated the Employers' desire not to hire journeymen under the age of 25. Other subjects such as when a man who is laid off or terminated needed to be paid, prejob conferences, and the signing of forms were discussed.

The slightest progress occurred at this meeting: the Employers agreed to provide paper cups on the job for sanitation purposes and the administrator of the proposed health plan was named, but not the group insurance plan itself. The Union held fast in favoring the old plan.

(d) *May 10 (District Council offices)*

On this date, the Union submitted its second proposal which again lacked any economic terms (R. Exh. 3). Among other subjects discussed without progress were the hiring hall, Sunday holidays, and subcontracting. As to the apprenticeship program, the Union offered to include a helper classification at a lower rate of pay. It is unclear to me whether

Scott responded by questioning the need for an apprenticeship program at all.[32]

Finally, Scott objected to the contractor's paying for the cleaning of the portable latrines after their use by a 15-man crew, because it was a cost item. The parties then agreed to meet on May 18 and Scott again asked Cardinal for the Union's economic package. To this, Cardinal responded, ''Maybe, we'll see how we move on this other stuff.'' Then, Scott said he needed figures by May 31, but that it didn't look to him like the Union wanted a contract (G.C. Exh. 17(d).

(e) *May 18 (Employers' council office)*

At this session, Sam Franklin of the Federal Mediation and Conciliation Service appeared for the first time. Both Cardinal and Scott testified that Franklin was there at their invitation. Martin's minutes do not reflect the answer to this conflict. I note that on April 26, all had agreed that Scott had first proposed calling in the mediator, but Cardinal had opposed calling him in at that time. In accord with the normal practice, Franklin, himself, did not testify at hearing.[33] I resolve this controversy by finding it likely that both sides, independent of, and without notice to the other side, called in Franklin.

Both sides made an initial presentation to Franklin. Scott again made reference to the May 31 expiration date and the fact that the Employers were unwilling to work beyond that date. Meanwhile, Cardinal had failed again to provide the Union's economic information on the grounds that there had been no movement on noneconomic issues. After both sides caucused with the mediator, bargaining resumed.

One of the subjects discussed was Scott's insistence that the framers have the exclusive right to classify carpenters. The Union rejected this out of hand. Again, the hiring hall procedure was also discussed, with Scott saying, ''We want to hire where we can . . . . I don't like seven pages of hiring hall restrictions.'' (G.C. Exh. 17(e).) The primary controversy existing in this meeting concerns an alleged Scott quid pro quo statement.

It is not uncommon for one side to offer something desired by the other, in exchange for a concession by the other side. Indeed, this is perhaps the essence or bargaining. In Scott's case, he offered to accept one of his proposals, if the Union agreed to another of his proposals: thus, job steward for Employer's hiring hall, safety committee for no-strike no-lockout provision, expedited grievance system for entire grievance and arbitration provision, and Employers' work rules in exchange for his showup pay proposal. I found Scott's testimony on this point less than illuminating. Here is the relevant exchange taken directly from the transcript:

Q. (Mr. Deeny): Now there's been a lot of testimony, though, that during bargaining you kept promising yours for yours or his for his, in other words, you would propose to the Union that if they would accept your no strike clause, you agree to your water cup clause.

A. There was some package bargaining that was being done.

Q. Package bargaining?

A. One clause package with another one: you accept mine, I'll accept yours.

Q. Yes, I understand that.

A. I'll agree to amend this one if you'll accept this one. And there were some agreements reached on some of those things.

Q. They were quid pro quo.

A. Certainly.

Q. Well, my question is that there's a testimony from Mr. Cardinel [sic] and Mr. Mills both that during the course of bargaining, you proposed that they accept your language for your proposal on X topic, and if they agreed to that, you would agree to your proposal on Y topic.

A. I hope I did not bargain that way. I don't know what their understanding—

Q. Was?

A. —was, but anytime that I am offering—

Q. Did you ever, during the course of those negotiations, propose that the Union accept your language on A topic, and if they did you would agree to your language on B topic?

A. No.

. . . .

Q. Did you, at any time, propose your safety language for your no strike clause? of words to the effect that you would agree to your safety language if they would agree to your no strike clause?

A. I prepared some safety language in response to that request, to have safety language in the contract. And I proposed it to the Union on 5-18, and I coupled this language with acceptance of the company's no strike

Q. Give me that again.

A. I coupled this article on safety to the company's no strike proposal.

Q. Okay, as you were proposing both of those jointly?

A. Yes.

[R. 2409–2412.]

I credit the testimony of Cardinal and Mills on this point. While Scott may have had a good motive in undertaking to bargain in this fashion, i.e., to expedite the bargaining process, it is inimical to the bargaining process for one side to propose a provision, contingent upon the opponent's acceptance of another provision from the same side. Once again, the parties made little, if any, progress at this session.

(f) *May 20 (Employers' council office)*

Franklin again appeared at this meeting. The Union negotiating team was joined by a representative from the International union, Lou Heath. The meeting began by Cardinal

[32] In his testimony, Cardinal began almost all of his answers by saying, ''To the best of my recollection . . . .'' This introduction to most of Cardinal's answers, together with the substance of some of his answers, convinces me that Cardinal's recollection was hazy. At one point Cardinal was virtually reading from his affidavit. This led to an agreement by all that his affidavit should be admitted for whatever weight I decided to give it. (G.C. Exh. 22.) In this context, I weigh Cardinal's testimony that he told Scott of his impression that Scott was making a ''take it or leave it offer.'' While Scott never used that precise language, it is clear that based on corroborating evidence, Cardinal's impression was reasonably based.

[33] See *NLRB v. Lemon Tree*, 618 F.2d 51 (9th Cir. 1980).

distributing the Union's third proposal (R. Exh. 4) and characterizing it as ''Christmas in July.'' This included for the first time, the Union' s economic terms. For his part, Scott began by saying, ''Today I still represent the same 5 contractors, but I can't say that for tomorrow. (G.C. Exh. 17(f)). Scott further stated that ''today is bottom line day.'' By that, Scott testified, he was referring to his request expressed at the prior meeting wherein he had asked for the Union to prepare the ''bottom line,'' it could sell to its members.

Despite this uncertain beginning, some results on minor matters did occur at this meeting. The Union had added new classifications such as helper. Journeyman pay would stay the same 12.93-1/2 per hour. With a new crew composition, including a helper who would receive no benefits, and increased use of apprentices, Mills testified that he would be able to give the Employers the savings they sought. However, Scott argued that construction would take longer and be of lower quality work under the Union's proposal. Another area discussed was shift work after hours, to accommodate shopping centers. There, the Union conceded that premium pay might be reduced or eliminated. For work out of town, the Union offered four 10-hour days to reduce Employer's expenses. However, on major disputes between the parties, such as hiring hall procedures, there was no progress.

After the meeting was concluded, Scott and union representatives had a conversation in the lobby of Scott' s building. Scott thanked the union representatives for the movement, but stated that he didn't want to give them any false hopes. Scott added that his guys were firm in their proposal and he didn't think it would do much good. Scott also indicated that one of his clients was seeking an extension of time and the Union indicated they would grant the request. The framer in question was Marquess.

(g) *May 26 (Local 1089 conference room)*

Again Franklin and Heath were present for this meeting in addition to the regular negotiators for each side. Scott began by stating that he wished he had good news for the Union, but he did not. After a meeting with the Employers 2 days earlier, he had prepared a final offer. (R. Exhs. 22, 10, 10A, and 10B.) The ''Final Offer to Union'' on behalf of M & O has relevant language on the issue of impasse. In pertinent part, the document reads as follows:

May 26, 1982

M & O CONSTRUCTION
FINAL OFFER TO UNION

1. The Contractor's offer for agreement is firm and final.

2. The Contractor reserves the right to inform current employees of the offer and to explain the provisions.

3. If the offer is not accepted by the Union with notification to the Contractor or his representative prior to June 1, 1982:

a. The economic terms of the offer shall be placed into effect on June 1, 1982;

1. Pension contributions will be discontinued.

2. Contributions to the Carpenters Health & Welfare Fund will be discontinued. The Contractor will begin enrolling employees under the Associated Framing and Finishing Contractors Trust in accordance with the offer.

3. Contributions to the Apprenticeship Trust will be discontinued and deductions for the vacation savings plan will likewise be discontinued.

4. Wage rates and classifications will become effective per the offer.

b. Current employees who are not or will not be classified as foremen or Class 1 framers who continue in the employ of the Contractor will be classified as follows:

Alva, Trinidad	2d Year Apprentice	$9.10
Berdine, Timothy	1st Year Apprentice	7.985
Echols, Terry	Class III Framer	10.40
Holder, Timothy	Class III Framer	10.40
Kinskey, Eric	Class III Framer	10.40
Greenwood, Bret	Class III Framer	11.08
Lewis, Robert	1st Year Apprentice	7.985
Loy, Harold	lst Year Apprentice	7.80
Serpa, Frank	Class II Framer	11.70
Warner, Russell	Class II Framer	11.70
Weidman, Glenn	Class III Framer	10.46

(R. Exh. 10(a)).[34]

Among the concessions made by Respondents in their last proposals were some language changes with respect to recognition and coverage of agreement, a new article (7) on safety, job steward, grievance and arbitration (expedited process added), deletion of condition that journeymen must be 25 years or older, and health and welfare (dependent coverage added).[35] Among provisions not changed by Scott, though desired by the Union, were no pensions, no vacations, no apprenticeship trusts, and unilateral employer classification of new employees, and no mandatory hiring hall (G.C. Exh. 17(g)).

The parties agreed to meet the afternoon of the following day, May 27. Cardinal denied that negotiations had reached impasse, and assured Scott that no strike would occur at that time.

The meeting scheduled for May 27 was never held. Cardinal called Scott on the telephone and explained that due to a conflict with other negotiations, he could not be present. The final relevant bargaining session was held on June 1.

(h) *June 1 (Arizona Employers' Council)*

Franklin, the Federal mediator, was replaced by Ron Collotta. Heath, for the Union, joined Scott and the regular union negotiators for this final session. The meeting began by Cardinal requesting information on the Employer's health and welfare plan and trust documents. Scott promised to pro-

[34] Respondents' final offers in evidence relate to M & O, Sage, Erickson, and Marquess. They all read the same except for par. 3,b which lists the employees of each Employer and the Employer's decision as to that employee's appropriate classification.

[35] A witness named James Dame testified at hearing. He was the former administrator of the new health and welfare plan instituted by Respondents effective on July 1. Scott first contacted him in May to discuss the new program. Scott never obtained copies of the underlying trust documents from Dame prior to June 1 and, therefore, could not convey these to the Union. However, he had given Scott some brochures and copies of other agreements on or about June 1.

vide the information as soon as he obtained it. The meeting ended by Scott telling the Union that the new terms were effective as of that date (G.C. Exh. 17(h)).

2. Analysis and conclusions

I begin with the recent case of *Western Newspaper Publishing Co.*, 269 NLRB 355 (1984), wherein the Board stated,

> after bargaining to an impasse, an employer does not violate Section 8(a)(5) of the Act by making unilateral changes, as long as the changes are reasonably encompassed by the employer's pre-impasse proposals. Furthermore, after an impasse has been reached on one or more subjects of bargaining, an employer may implement any of its pre-impasse proposals, even if no impasse has occurred as to those particular proposals which are put into effect.

There is no issue in this case regarding the implementation of Respondents' hiring hall proposals. That is, if there was an impasse in bargaining, then the Respondents were privileged to implement a voluntary hiring hall provision, which was part of the Employers' preimpasse proposal. I turn now to examine this critical question of impasse.

Before determining whether an impasse exists in the present case, I should define the term:

> A genuine impasse in negotiations is synonymous with a deadlock; the parties have discussed a subject or subjects in good faith, and despite their best efforts to achieve agreement with respect to such, neither party is willing to move from its respective position. When such a deadlock is reached between the parties, the duty to bargain about the subject matter of the impasse merely becomes dormant until changed circumstances indicate that an agreement may be possible.[36]

Perhaps the leading case explaining the concept of impasse is *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), enfd. sub nom. *AFTRA, Kansas City Local v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968). There the Board provided guidelines to determine whether an impasse exists:

> Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations, are all relevant factors to be considered in deciding whether an impasse in bargaining existed . . . .

Respondents have the burden of establishing the existence of impasse.[37]

I turn now to apply the *Taft Broadcasting* criteria to the facts of the instant case:

a. *Bargaining history*

This means the length of time over which the employer and the union have been party to collective-bargaining agreements. In the instant case, the parties have had prior collective-bargaining agreements, but the parties have not previously engaged in individual bargaining. That is, as noted above, the employers have signed memorandum agreements in the past adopting the Master Labor Agreement. Because the parties here, in effect, lacked a bargaining history, I find that this factor weighs against finding impasse. When an employer has for many years successfully consummated collective-bargaining agreements, the Board may be prone to accept its hard bargaining position as not violative of the Act.[38]

b. *Length of negotiations*

Here the parties had eight bargaining sessions, which generally lasted 2–3 hours. Considering (1) that the employers were attempting to obtain significant concessions from the Union, (2) that the negotiating started comparatively late, allowing for only 2 months before the expiration of the contract, (3) that Scott was attempting by himself to represent the interests of five contractors purporting to bargain as individuals, (4) that both Scott and the union negotiators had other important commitments during the same period, and (5) that Scott and the union negotiators did not know each other from prior bargaining, I find that the number and duration of bargaining sessions do not support a finding of impasse.

To be sure, there is precedent for finding impasse in only eight meetings.[39] In this case, however, given the five specific factors present in the preceding paragraph, in the overall factual content of this case, eight meetings was surely not enough. More importantly, the sequence of the meetings is revealing. Almost a month elapsed between the first meeting on March 31 and the second on April 26. This left slightly over a month for the remaining six meetings. Of these remaining meetings, May 3, 10, 18, 20, and 26 and June 1, several were held after a week's time had elapsed.

c. *Importance of the issue or issues to the parties*

In this case the parties failed to reach agreement on, among other matters, the union hiring hall, pensions, employer right to classify newly hired employees, and the no-strike no-lockout clause. Comparatively speaking, wages were not particularly critical, with the Union prepared to accept a wage freeze. In light of these other important matters over which the parties could not agree, this factor weighs in favor of impasse.

d. *The contemporaneous understanding of the parties as to the state of negotiations*

The Union denied that impasse had occurred and desired to continue bargaining. Scott stated that impasse had oc-

[36] *Hi-Way Billboards, Inc.*, 206 NLRB 22, 23 (1973), enf. denied on other grounds 500 F.2d 181 (5th Cir. 1974). In *Alsey Refractories Co.*, 215 NLRB 785, 787 (1974), the Board used slightly different terminology to define ''impasse'' as a situation in which one party is ''warranted in assuming . . . that the [other party] had abandoned any desire for continued negotiations, or that further good-faith bargaining would have been futile.''

[37] The burden of proving an affirmative defense such as impasse is on the party asserting it. *Marydale Products Co.*, 133 NLRB 1232, 1235 fn. 8 (1961); see also *Vance v. Terrazas*, 444 U.S. 252, 269 fn. 11 (1980).

[38] See *Murphy, Impasse and The Duty to Bargain in Good Faith*, 39 U of Pittsburgh L. Rev. 1, 8 (1977). I have relied on this authority extensively in preparation of this section of the decision.

[39] See, e.g., *Fetzer Television, Inc. v. NLRB*, 317 F.2d 420 (6th Cir. 1963); *NLRB v. Intracoastal Terminal, Inc.*, 286 F.2d 954 (5th Cir. 1961).

curred.[40] Specific assurances were given by Cardinal that a strike would not occur upon expiration of the contract. However, despite the Union's willingness to continue negotiations, it did not offer to modify its bargaining stance in any substantial way. This raises a serious question as to what the Union expected to accomplish if impasse had not occurred and if negotiations had continued.[41] Accordingly, I weigh this factor in favor of impasse.

None of the above factors is determinative of impasse under Board law. However, the next and final factor will resolve the question of impasse when considered with all other evidence.

e. *Good faith of the parties*

Perhaps the most important factor in any consideration of impasse, the good faith of the parties must be carefully examined. I begin by defining the terms. It has been defined variously as: ''A desire to reach ultimate agreement, to enter into a collective bargaining contract'';[42] ''a willingness to negotiate toward the possibility of effecting compromise'';[43] a ''willingness among the parties to discuss freely and fully their respective claims and demands and, when these are opposed, to justify them on reason'';[44] ''the serious intent to adjust differences and to reach an acceptable common ground'';[45] ''a genuine desire to compose differences and to reach agreement'';[46] and a readiness ''to enter into discussion with an open and fair mind, and a sincere purpose to find a basis of agreement.[47] Good faith is ''inconsistent with a predetermined resolve not to budge from an initial position,''[48] although it ''does not require the yielding of positions fairly maintained'';[49] ''requires more than a willingness to enter upon a sterile discussion of union-management differences,'' yet does not demand that a party ''engage in fruitless marathon discussions at the expense of frank statement and support of his position'';[50] and is not satisfied by ''shadow boxing to a draw''[51] or ''the mere willingness of one party in the negotiations to enter into a contract of his own composition.''[52]

The assessment of good faith ''is based on reasonable inferences drawn from the totality of the parties' conduct at, and away from, the bargaining table'';[53] and ''an employer's bargaining position and proposals'' are relevant to that assessment.[54]

Another aspect of lack of good faith is what has been characterized as ''surface bargaining.'' This means a party merely goes through the motions of bargaining, e.g., by rejecting the other party's proposals and tendering its own without attempting to reconcile the parties' differences,[55] by offering proposals that are predictably unacceptable, or by taking an inflexible attitude on major issues and failing to make proposals of reasonable alternatives.[56] With the above as general guidelines, I turn now to examine the good faith, or lack thereof, of each side.

(1) Respondents[57]

(a) *Bargaining proposals*

At page 102 of its brief, Respondents contend that individual proposals, while a factor, cannot be the only measure of whether the parties have been bargaining in good faith. This statement is erroneous. In *NLRB v. A-1 King Size Sandwiches*, 732 F.2d 872 (11th Cir. 1984), the court of appeals citing other judicial authority, stated, that sometimes, especially if the parties are sophisticated, the only indicia of bad faith may be the proposals advanced and adhered to.[58] In the cited case, the court looked to the content of the bargaining proposals together with the positions taken by the company to determine whether the company bargained in good faith. After discussion, the court enforced the Board's order. So, too, in the present case, without suggesting that the bargaining proposals are the only indicia of bad faith, I find that Respondents' proposals smack of bad faith.

As indicated above, the only significant concession made by Respondents was to change its health and welfare plan from excluding dependents to including dependents.[59] This change occurred primarily due to the arguments of Bill Butler, who convinced the other Respondents to go along. On the other hand, it was Bill Butler who was most adamant on the subject of abolishing pensions. It seems more than mere coincidence that Butler's pension refund was delayed as indicated above, and that Butler advocated this position.[60] It is unnecessary to repeat the discussion of Respondent's pro-

[40] Assuming without finding that Scott truly believed that impasse had occurred, this belief must be supported by objective fact, for the test is objective, not subjective. *Fairmont Foods, Inc. v. NLRB*, 471 F.2d 1170, 1173 (8th Cir. 1972), quoting *Taft Broadcasting Co.*, supra, 163 NLRB at 478. The case of *Cheney California Lumber Co. v. NLRB*, 319 F.2d 375 (9th Cir. 1963), is not to the contrary. That case requires that such a belief in impasse be supported by ''reasonable'' objective facts. 319 F.2d at 380. In this case, I will look to the totality of objective facts both as indicated above and in the analysis of good faith below.

[41] Compare *Pay N Save Corp.*, 210 NLRB 311 (1974); *C. C. Lang & Son, Inc.*, 102 NLRB 1667 (1953), enfd. 212 F.2d 436 (6th Cir. 1954); see also *Murphy*, supra, fn. 54 at 12–13. I have read and considered General Counsel's Br. 75–79 (The Union's Offer to Compromise and Make Concessions). However, I remain unconvinced that the Union proposed new movement on the major issues dividing the parties.

[42] *NLRB v. Insurance Agents' Union*, 361 US 477, 485 (1960).

[43] *Evansville Chapter AGC v. NLRB*, 465 F.2d 327, 335 (7th Cir. 1972).

[44] *NLRB v. George P. Pilling & Son Co.*, 119 F.2d 32, 37 (3d Cir. 1941).

[45] *U.S. Gypsum Co.*, 200 NLRB 1098, 1101 (1972), enf. denied 484 F.2d 108 (8th Cir. 1973).

[46] *Akron Novelty Mfg. Co.*, 224 NLRB 998, 1001 (1976).

[47] *NLRB v. Herman Sausage Co.*, 275 F.2d 229, 231 (5th Cir. 1960).

[48] *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 154 (1956) (separate Frankfurter opinion).

[49] *NLRB v. Herman Sausage Co.*, supra, 275 F.2d at 231.

[50] *NLRB v. American National Insurance Co.*, supra, 343 U.S. 402, 404.

[51] *NLRB v. Herman Sausage Co.*, supra, 275 F.2d at 232.

[52] *U.S. Gypsum Co.*, supra at 200 NLRB 1101.

[53] *Akron Novelty Mfg. Co.*, supra, 224 NLRB at 1001.

[54] *A-l King Size Sandwiches, Inc.*, 265 NLRB 850 (1982).

[55] *Neon Sign Corp.*, 229 NLRB 861 (1977), enf. denied 602 F.2d 1203 (5th Cir. 1979).

[56] *Brownsboro Hills Nursing Home, Inc.*, 244 NLRB 269 (1979).

[57] Because of tho overwhelming amount of evidence offered by the General Counsel, I have not considered the Settlement Agreement, by which certain M & O employees were reinstated, on the question of Respondents' good faith. The agreement contained the usual nonadmission clause and General Counsel argued that the evidence was for background only. Accordingly, a possible issue on appeal is avoided by not weighing the evidence in assessing good faith.

[58] See also *NLRB v. Wright Motors, Inc.*, 603 F.2d 604, 609 (7th Cir. 1979).

[59] Arguably, changing the age 25 threshold for journeymen carpenters was another significant concession.

[60] Butler claimed to have ascertained majority employee opinion to justify abolition of the pension plan in exchange for more money up front. As evidence of bad faith, there was no immediate additional money up front and no convincing evidence of employee opinion either.

posals here. It suffices to say that I infer bad-faith bargaining from their content.[61]

As a basis for the conclusion above, I find not only that Respondents' proposals involve take-aways, but, in addition, involve virtual abolition of the Union's representative role. Thus, the Union's hiring hall would be for all intents and purposes abrogated. The contractors could decide for themselves at what level a new employee would be classified. No matter what happened, the Union could not strike during the term of the contract. Finally, the contractors could deal directly with unit members during slow periods to negotiate lower pay rates. No union could have accepted these provisions and the contractors must have known this.[62] Further, the proposals must be viewed in the context of overall Respondent's strategy. Both Scott and Owens testified that Respondents' best offer was given at the onset because Scott didn't like to haggle with the Union. (R. 1306, 1297.) Clearly it was never intended there would be the normal give and take of negotiations and the evidence shows that Respondents achieved their intentions.

(b) *Scott's conduct and statements*

Turning next to Scott's conduct and statements at the bargaining sessions, I find this factor also suggests bad faith by Respondents.[63] As noted above, Scott had an unusual sense of humor and was given to making statements which could be interpreted in different ways. For example, a nonunion proposal, a ''no fat'' proposal, ''bottom-line day,'' Scott's ''quid pro quo'' statement and similar statements.[64] To be sure, Scott provided explanations in his testimony for these statements, giving them an innocuous veneer. However, the explanations and clarifications were not usually given at the time the statements were made, leaving the union negotiations to ponder Scott's overall intentions.[65]

(c) *Negotiation deadline*

The third factor in support of Respondents' bad faith, and to a degree covered above, is the deadline imposed by Respondents. In this respect, Scott's clients rather than Scott, himself, were primarily at fault. The contractors were dilatory by not making arrangements with Scott much sooner than February–March, given what the contractors hoped to achieve. I believe and find that Scott as well as the Union were under intense pressure due to this deadline. This affected Scott's behavior and contributed to the bad faith of Respondents.

(d) *Federal mediator*

A fourth factor to be discussed is the presence of the Federal mediator. I have found that both sides requested his presence. His mere presence is a neutral factor here since there is no evidence of any statements made by mediator relative either to impasse or good faith of the parties.[66] Arguably, a request for a Federal mediator is inconsistent with bad faith, but to the extent that such an inference can be drawn, it is outweighed by other evidence.[67]

(e) *Conduct away from table*

Finally, I look to Respondents' conduct away from the table. This element of bad faith does not apply to Guzman who was not implicated in any relevant conduct. However, the credited evidence against M & O and to a lesser extent against Sage is considerable.

At pages 174 and 176 of their brief, Respondents contend that certain persons: McDonald, Cranton, Friedman, Mike Butler, Minutolo, Carroll, Dankworth, and Jim Gentry, were not agents of the respective Employer. As to Cranton, Dankworth, and Carroll, Respondents stipulated that they were supervisors and agents of the Employer. (R. 487) Minutolo was stipulated to be a supervisor (R. 494) as conceded in Respondents' brief, (p. 176). I find that as Supervisors Minutolo, Gentry, Friedman, and Mike Butler (as part owner of Sage) were also agents of their respective Employers.[68] McDonald provided no relevant evidence and will not be considered. Similarly, I will not consider the agency status of Kevin Owens or Henry Zanin Jr., since no issue of agency status is presented as to them. Finally, Respondents contend that Chuck Ringele and Bob Lindsey, while supervisors, were members of the bargaining unit, prior to expiration of the contract, and as such, the Employer cannot be held responsible for their statements. However, in reliance upon the

[61] See *United States Gypsum Co.*, supra, 200 NLRB at 1101; *Herman Sausage Co.*, supra, 122 NLRB at 170, enfd. 275 F.2d 229 (5th Cir. 1960); *Romo Paper Products*, 220 NLRB 519, 525 (1975), enfd. 538 F.2d 312 (2d Cir. 1976).

[62] See *Continental Insurance Co. v. NLRB*, 495 F.2d 44, 48–49 (2d Cir. 1974).

[63] At pp. 208–210 of their brief, Respondents make a great deal out of their theory that Respondents were not a member of a multiemployer bargaining group. I do not see the issue as being so critical as to deserve the amount of attention paid to it. Scott was the agent of the three Respondents during negotiations and they are responsible for his conduct and statements. I make this finding whether or not Respondents were part of a multiemployer group. To the extent the question may be important on appeal, I find that a multiemployer group existed in this case and Respondents were part of it. In *H & D, Inc. v. NLRB*, 670 F.2d 120, 122 (9th Cir. 1982), the court stated,

> To form a multiemployer group, individual employers need only express an unequivocal intention to be bound in collective- bargaining by group rather than individual action. No formal organizational structure is required. [Citations omitted.]

Witness the evidence in the present case: Each Respondent paid an initiation fee to join Scott's Employers' organization and divided his hourly fee of $40 by 5. (This includes the two other contractors.) There is no evidence that any Employer was assessed any charges except his pro rata cost for Scott's work. Then, in his negotiations with the Union, Scott always submitted uniform proposals for all five contractors and always spoke for the same five, without distinguishing any special circumstances applicable to fewer than all five. Certain fringes such as medical benefits were said by Scott to be portable, i.e., transferable only between the five contractors. Thus, when an employee leaves one contractor to work for another, the affected fringes would transfer over. Finally, when the Employers did disagree among themselves regarding, for example, abolishing the pension plan, or having dependent medical coverage, these matters were settled privately so that Scott could present a common front to the Union.

Measured against all this evidence is Scott's statement that he was representing the contractors as individuals only. I must conclude that there was a multiemployer bargaining group here and Scott was its agent.

[64] These statements were not merely opening-day bombast. *Romo Paper Products*, supra, 220 NLRB at 524, because Scott never really altered the stand he took on the first day.

[65] Scott's conduct at the bargaining table could also be faulted for an absence of give and take, or, put differently, adamance and refusal to concede. See *NLRB v. General Electric Co.*, 418 F.2d 736 (2d Cir. 1969), cert. denied 397 U.S. 965 (1970); *Marden Mfg. Co.*, 106 NLRB 1335 (1953), enfd. 217 F.2d 567, cert. denied 348 U.S. 981 (1954). I count this factor in support of my finding of Respondents' bad faith.

[66] Compare *Midwest Casting Corp.*, 194 NLRB 523 (1971). The Board has stated that any offers extended through mediators are admissible in bad-faith bargaining cases. *South Shore Hospital*, 256 NLRB 1, 8 fn. 19 (1981).

[67] See *NLRB v. Cambria Clay Products*, 215 F.2d 48 (6th Cir. 1954).

[68] *Aladdin Industries, Inc.*, 147 NLRB 1392 (1964).

case cited by Respondents, *Bennington Iron Works*, 267 NLRB 1285 (1983), I find that Respondent M & O is bound by Ringele and Lindsey as their statements in the context of this case strongly indicate that Dick Owens and Henry Zanin Sr. ''encouraged, authorized, or ratified the supervisors' activities, or acted in such a manner as to lead the employees to reasonably believe that the supervisors were acting on behalf of management.''

Thus, without repeating my findings of fact in toto, I note that Dick Owens told Desi Kist on May 20 that M & O was going nonunion even if Owens had to close its doors and reopen under a different name. Zanin Sr. said essentially the same thing to Kist, in early May. Essentially, the credited evidence falls into certain patterns: as to M & O, besides the Kist testimony as to Dick Owens' statements, there is Ringele's statements that Owens wouldn't make any changes in contract proposals and he knew that the proposals would be unacceptable to the Union; also, there are numerous statements by supervisors to employees beginning in early spring that M & O was going nonunion or probably going nonunion, and asking the listener to indicate a choice, union or nonunion. In some cases, employees who desired to stay with the Union were told to turn in equipment, or be prepared for layoff or pay cuts; there in the circulation of proposals by supervisors, accompanied by explanations of the Company's alleged financial condition or in some cases with approving comments from supervisors.

As to Sage Development, there are numerous statements relative to what would happen to the new contract, if Bill Butler didn't get his pension money. Other evidence involved statements by supervisors that Sage would go nonunion if union concessions were not made.

The evidence summarized above seems calculated to create a coercive and poisoned atmosphere surrounding the negotiations.[69] Needless to say, all or most of the supervisor statements being made were reported back to the union negotiators.

Thus, the bad faith of M & O and Sage seems particularly obvious to me. However, there is also ample evidence to include Guzman, based on the content of the proposals and Scott's conduct at the bargaining table.[70] I agree with General Counsel (Br. 107–109) that the case of *Schuck Component Systems*, 230 NLRB 838, 845–846 (1977), a strong similarity to the instant case,[71] and I cite the case in support of my findings that Respondents lacked good faith. However, the union in that case bargained in good faith and since this is a contested point in the present case, I am not yet prepared to find no impasse.

[69] Since General Counsel did not allege independent violations of Sec. 8(a)(1) of the Act, I did not analyze the evidence from that perspective.

[70] The evidence of a disagreement between Respondents over the health and welfare coverage of dependents, which might indicate good faith in negotiations, is so outweighed by contrary evidence showing bad faith as to become virtually insignificant.

[71] Thus, in *Schuck*, respondent had formerly executed industry pattern contracts, but had withdrawn from that practice for economic reasons. A superintendent named Miller told employees prior to expiration of the contract and while bargaining was in progress, that Respondent intended to go nonunion. Miller and another supervisor discussed with employees during bargaining certain aspects of the company's proposals. There were still other similarities rendering *Schuck* fully applicable to this case.

(2) Union

The duty to bargain imposed upon a labor organization by Section 8(b)(3) is the same as that imposed upon employers under Section 8(a)(5).[72] In *Roadhome Construction Corp.*, 170 NLRB 668 (1968), a case cited by Respondents, the administrative law judge indicated, at 672, that it is a defense to a charge of employer bad faith, that the union was not itself in good faith. In their brief (p. 198) Respondents assert that,

> *Roadhome* and its progeny stand for the rule that if any of the Respondents are found to have failed to bargain in good faith because of their agents' statements, such a finding does not impair the finding of a valid impasse if the Union has also failed to bargain in good faith.

The cited case does not yield the conclusion urged by Respondents. I find the paragraph from Respondents' brief cited above is an erroneous statement of law. To the extent that misconduct of a union might immunize otherwise unlawful conduct of an employer based upon *Roadhome* and its progeny—a question which need not be resolved in this case[73]—said cases would apply only where the employer is charged with refusal to bargain. Here Respondents are charged with making unilateral changes. They have raised impasse as an affirmative defense, and *Roadhome* and its progeny do not apply to the issue of impasse.

In the alternative, I will assume arguendo that the paragraph from Respondents' brief is accurate. Because I found bad faith based not only on agents' statements, but also based on content of bargaining proposals and other conduct at the bargaining table, by the terms of Respondents' own contention, *Roadhome* and its progeny do not apply to this case.

I make still additional alternative findings. To the extent that Respondents have properly placed in issue the Union's conduct during negotiations, I make the following analysis and conclusions. In *G. Lowry Anderson, Inc.*, 103 NLRB 1711, 1728–1729 (1953), the Board affirmed an administrative law judge's finding that an impasse in negotiations had been caused by a union's adamant stand that it would consent only to the same agreement that it had with other area employers and that further meetings would be futile.[74] This authority can be distinguished from the instant case.

[72] *Maritime Union (Texas Co.)*, 78 NLRB 971, 980–981 (1948).

[73] However, note the case of *NLRB v. Pacific Erectors, Inc.*, 718 F.2d 1459 (9th Cir. 1983). There, the court responded to the employer's claim that the union had breached the contract:

> The Company cites no authority for the proposition that a material breach excuses the duty to bargain. While I may excuse the performance of the more tangible duties under the contract, the duty to bargain may be like the duty to arbitrate, which the second circuit has decided is not discharged by a material breach. [Citations omitted.] We need not decide the question, however . . . .

See also *Goodyear Tire & Rubber Co.*, 271 NLRB 343, 346 fn. 10 (1984). In that case, affirmed by the Board, the administrative law judge stated that '''the clean-hands doctrine' of equity does not operate against a charging party . . . since proceedings such as this are not for the vindication of private rights, but are brought in the public interest and to effectuate statutory policy.''

[74] See also *NLRB v. San Angelo Standard, Inc.*, 228 F.2d 504 (5th Cir. 1955).

(a) *Most favored nations clause*

In the instant case, there was a ''Most Favored Nations'' clause in the old Master Labor Agreement (G.C. Exh. 5) and in the new one. (R. Exh. 9.) Very simply, this clause states that whatever concessions the union gives one employer, the union must give other employers with whom it has a bargaining relationship. Respondents contend (Br. 28–30) that the existence of this clause in the new contract effective September 2, and its possible application to the negotiations, is evidence of the Union's bad faith. I find no evidence to support this assertion. Rather, the evidence shows the Union's awareness of the clause and its obligations thereunder.

The Supreme Court has stated, ''A legitimate aim of any labor organization is to obtain uniformity of labor standards . . . .'' *United Mine Workers v. Pennington*, 381 U.S. 657, 666 (1965). ''A union may adopt a uniform wage policy and seek vigorously to implement it'' among several employers. Id., 381 U.S. at 665 fn. 2. Moreover, by agreeing to a helper classification and variance in the standard crew, Mills, on behalf of the Union, purported to submit computations to Scott showing how labor costs could be reduced.[75] By the time the Union's final proposal had been submitted, the Union had offered Scott concessions on elimination of premium pay after 9 p.m., makeup days, including Saturdays, at straighttime pay, and workdays of four 10-hour days for out-of-town work to reduce employer costs. Further, the Union at no time indicated that further negotiations would be futile. To the contrary, the Union did not impose a strike deadline, offered to extend the contract for one of the Employers who made inquiry, and denied that impasse had been reached.

(b) *Untimely economic proposals*

Notwithstanding all of the above, I find that the failure of the Union to present its economic proposals until May 20 despite Scott's repeated prior requests, is somewhat disturbing. In *Whisper Soft Mills*, 267 NLRB 813, 814 (1983), the Board noted that the employer's failure to make a timely wage offer during negotiations violated Section 8(a)(5) and (1) of the Act in that such failure constituted a refusal to bargain, under the facts of that case. Other cases have also found employers in violation of the Act for not presenting economic proposals in a timely manner.[76] All these cases, however, can be distinguished from the instant case and do not apply. The Union here never conditioned bargaining on economic matters, on final agreement, and on noneconomic issues. Further, wages never appeared to be a critical factor in negotiations, unlike the cited cases. Finally, the cited cases do not deal with the subject of impasse, but rather the duty of the employer to bargain.

To a certain extent, Respondents, themselves, are responsible for the untimely economic proposals from the Union. As noted above, the Union was receiving reports from its members as early as March–April that Respondents' agents and supervisors were making remarks as described above. These reports must have had some negative effect on preparation of the Union's bargaining and impeded the calculation of its economic figures.

(c) *Union's plan to gather information from field*

In its brief, pages 200–201, Respondents claim, without citation of authority, that the Union's instructions to its members to report any remarks or activity by Respondents' agents about Respondents' intentions at the bargaining table, was evidence of union bad faith. This contention completely lacks merit and must be dismissed out of hand.

(d) *Length of time between bargaining sessions*

Turning next to another area of concern, I note the length of time between sessions and the cancellation of the May 27 scheduled session. I do not find that those matters were the fault of Cardinal.[77] Rather, they were primarily the fault of late-starting negotiations caused by Respondents' failure to make a timely arrangement with Scott. The Employers must have known that at the same time Scott was negotiating with the Union, the Union was negotiating with the Associated General Contractors, the same bargaining group which the Respondents no longer desired to be part of.

In sum, I find that there was no credible evidence that the Union negotiated in bad faith.[78] Alternatively, to the extent that some evidence may suggest union bad faith, it was either provoked by Respondents, or such bad faith does not cause an impasse to be established in the context of this case, where all other evidence indicates there was no impasse.

f. *Alleged waiver or estoppel of Union's rights*

A final issue presented by Respondents is whether the Union waived its right to complain about a unilateral change in its hiring hall or whether theUnion was estopped from making any such complaint. This issue can be quickly disposed of.

First, there was a meeting at Hunter's Inn, a Phoenix restaurant, in July 1979, between the representatives of the Union and framing contractors, including Respondents. The purpose of the meeting, called by the Union, was to discuss the problems being experienced by the contractors and the

[75] Early in negotiations, Scott had stated that the contractors needed to achieve a savings of $2 per hour.

[76] See *Federal Mogul Corp. v. NLRB*, 524 F.2d 37, 38 (6th Cir. 1975); *South Shore Hospital v. NLRB*, 630 F.2d 40, 43 (1st Cir. 1981), cert. denied 450 U.S. 965 (1981); *Eastern Maine Medical Center v. NLRB*, 658 F.2d 1, 11–12 (lst Cir. 1981); *NLRB v. Patent Trader, Inc.*, 415 F.2d 190, 198 (2d Cir. 1969), modified on other grounds 426 F.2d 791 (1970).

[77] I do not credit Scott's testimony that Cardinal suddenly left on May 3 without explanation. Neither Mills' nor Martin's testimony, nor Martin's minutes reflect this. Moreover, there would have been no motive for Cardinal to have done this. As to the canceled May 27 meeting, I find that Cardinal had an unavoidable conflict in his schedule which justified the cancellation of that meeting. Note Scott's letter to Cardinal of June 18 (R. Exh. 11), complaining about the May 27 cancellation. Scott does not claim in the letter that Cardinal never gave a reason for the cancellation.

[78] During cross-examination of Mills, counsel for Respondents attempted to delve into proposals between the Union and Employers, other than framers, in order to test the good faith of the Union. I refused to permit this (R. 2357–2360). Later in the hearing, the contracts between other employers and the Union were placed in the rejected file (R. 2575). If this decision becomes an issue on appeal, I note the case of *Stroehmann Bros. Co.*, 268 NLRB 1360, 1361 fn. 10 (1984). There, the Board had occasion to review a similar decision by an administrative law judge. In affirming the decision the Board stated, ''administrative law judges are authorized to exclude such evidence 'if its probative value is substantially outweighed by . . . considerations of undue delay, waste of time, or needless presentation of cumulative evidence.' Fed.R.Evid. 403 . . . such a rule is a necessary 'concession to the shortness of life.'''

The evidence the respondent sought to introduce had little probative value between the respondent and this Charging Party, and would have opened up a number of collateral issues, the exploration of which would have consumed a great deal of time.

problems being caused by the contractors. With respect to the latter, the primary problem concerning Jack Greene, who chaired the meeting, was the contractors hiring ''off the ditchbank,'' i.e., hiring without going through the Union's hiring hall, in violation of the contract. Greene told the contractors that if the violations didn't cease, the Union would take appropriate legal action. In an attempt to stop the hiring hall violations, short of legal action, Greene proposed a prehire agreement where the contractors would let the Union know about individuals desired for the apprenticeship program instead of taking the people right off the apprenticeship list. In its brief (p. 16) Respondents write, ''Mills admitted that Greene's prehire agreement was, in effect, a midterm modification of the agreement.'' Mills never gave that testimony. Here is what he did say:

> Q. So he [Greene] was, in effect, proposing, if you will, a mid-term modification, was he not?
>
> A. He was saying that if we can get something worked between us instead of having these, you know, we don't want to hassle them, and we don't want them to violate the contract. If we can work out, he'd take it back to the AGC and get their approval with something like that.

(R. 2273–2274.)

I find no midterm modification because Respondents never accepted this offer according to its terms. Moreover, by its terms, the proposal applied only to the apprenticeship program and not journeyman, where the violations were occurring. Finally, and most importantly, the Union never acquiesced in hiring hall violations by Respondents. The Hunter's Inn meeting and a second one to be described below are proof of the Union's resolve. As I noted above, Mills quit his job at one point because he believed union officials desired him to allow Kevin Owens to work without a proper referral. When union officials convinced Mills that his impressions were not true, he returned. Mills and Martin and others were constantly policing the contract by visiting jobsites and inspecting written referrals. Occasionally, unreferred carpenters would even run from the jobsite when they observed Mills approaching.

In 1980, tho Union called a second meeting at District Council offices regarding U.S. Carpentry, a growing nonunion contractor, who constituted an economic threat both to the union contractors and to the Union. Representatives of M & O and Sage were present, but it is not clear if Guzman was present. The Union was attempting to organize U.S. Carpentry, but at least one contractor, Bill Butler, said for the Union to leave U.S. Carpentry alone, because the union contractors wanted to take care of them. By that, Butler meant that work was picking up and M & O and Sage and the others would break U.S. Carpentry. I do not credit the testimony of Bill Butler that Mills said at the meeting that the Union would permit the union contractors to hire the best workers away from U.S. Carpentry with the Union acquiescing in any hiring hall violations. This is at complete odds with Mills' manner of performing his job.

None of this is a bona fide issue. The Union desired proper referrals through its hiring hall because these referrals were its life blood. It is true that Arendell made a reference to some unreferred carpenters, 1–2 in a crew of 8–15, but there is no evidence that the Union condoned this. To the contrary, this was part of the job of Mills, Martin, and others, to continue unrelenting pressure to stop this practice. It would be very difficult to make a case on this record for union acquiescence in hiring hall violations; it would be impossible to find that the exclusive nature of the hiring hall had therefore been repealed so the Union was estopped from asserting its rights under the contract. If that somehow could be shown, Respondents would, in fact, be profiting from their own misconduct, since such changes which may have occurred—I don't find any authorized by the Union—were to stop the contractors from violating the hiring hall provisions to begin with. Accordingly, I find no waiver and no estoppel in this case.

Rather, I find that impasse was never reached, because Respondents did not bargain in good faith and for other reasons, and, therefore, Respondents violated Section 8(a)(1) and (5) of the Act by unilaterally changing the hiring hall provisions of the contract.

CONCLUSIONS OF LAW

1. Respondents are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By failing and refusing to abide by the exclusive hiring hall and referral arrangements covering the carpenter employees of each of Respondent Employers in the appropriate unit described in paragraph 5 below, which provisions are contained within the 1979–1982 Arizona Matter Labor Agreement, to which each Respondent is bound, thereby unilaterally changing the terms and conditions of employment of its employees, Respondents have engaged in unfair labor practices violating Section 8(a)(1) and (5) of the Act.

4. Respondents did not, prior to June 1, bargain to impasse with the Union.

5. The following employees of Respondents constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All employees of Contractors employed to perform or performing construction work as such construction work is more particularly defined hereafter in Article 2 of this Agreement, in the area known as the State of Arizona, except those employees exempted from the provisions hereof by the Recognition and Dispatching Provisions of the respective individual craft sections of this Agreement; and the Contractors shall not offer or grant to any individual employee or group of employees whomsoever, performing any work mentioned in Article 2 of this Agreement, any less favorable terms and conditions of employment than provided for by this Agreement. [G.C. Exh. 3, par. 7.]

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondents have engaged in certain unfair labor practices, I shall recommend that Respondents be ordered to cease and desist therefrom and to take certain

affirmative action designed to effectuate the purposes of the Act.

Having found that Respondents violated Section 8(a)(5) and (1) of the Act by their unilateral change in the hiring hall and referral provisions contained in the 1979–1982 Arizona Master Labor Agreement between the Union and the Associated General Contractors to which Respondents are bound, it is recommended that for the period of June 1 to September 2, Respondents rescind all unilateral changes made in the terms and conditions of employment; give effect retroactively to the terms and conditions of employment for the unit employees as contained in the provisions; make whole the employees and would be employees in the unit found appropriate herein for losses suffered by reason of their failure to comply with the provisions, with interest; and make all contributions to the health and welfare, training, supplemental benefits, vacation savings, and pension funds and make payments to the prescribed fees to administer the funds as provided in the 1979–1982 Arizona Master Labor Agreement and the various Contributing Employers Agreements signed by Respondents relative to said funds, which have not been paid and which would have been paid absent Respondents' unlawful discontinuance of such payments.[79] Backpay plus interest for those incurring loss because of Respondents' noncompliance with the referral provision of the 1979–1982 agreement shall be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977).[80]

[Recommended Order omitted from publication.]

[79] At p. 111 of his brief, General Counsel contends that would-be employees after September 2, should be made whole at the wage rates and with respect to all other benefits as provided by Respondents for their unit employees. I cannot agree with this claim. The Union and the Associated General Contractors reached agreement on a new contract effective September 2 (R. Exh. 5). Later, Respondents agreed to this contract. Accordingly, any remedy for would-be employees of Respondents subsequent to September 2 must be pursuant to the terms and conditions of the new contract. In addition, according to the terms of the written stipulation (G.C. Exh. 3, pars. 12, 13), Respondents are charged only with violations of the Act between June 1 and September 2; accordingly, the remedy ordered must be correlated with the violations as charged and found.

[80] See, generally, *Isis Plumbing Co.*, 138 NLRB 716 (1962).

Jordan Ziprin, Esq., for the General Counsel.
Robert J. Deeny and *Rebecca A. Winterscheidt, Esqs. (Snell & Wilmer)*, of Phoenix, Arizona, for the Respondent.
Michael J. Keenan, Esq. (Ward & Keenan, Ltd.), of Phoenix, Arizona, for the Charging Party.

SUPPLEMENTAL DECISION

MICHAEL J. STEVESON, Administrative Law Judge. On July 29, 1988, the Board issued an ''Order Remanding'' for further consideration of this case consistent with the Board's decision in *John Deklewa & Sons*, 282 NLRB 1375 (1987). More specifically, the Board directs me, if necessary, to reopen ''the record to adduce further evidence on the exclusive representative status of the Union.''

On August 25, I issued an Order directing the parties to submit statements of position ''with respect to whether the party believes it necessary to reopen the record, and if so, whether such reopening will require a supplemental hearing.''

Both General Counsel and Respondents Sage Development Co. and M & O Construction Co., Inc. filed timely statements of position. By letter, Charging Party adopted General Counsel's position. Respondent Joe Guzman Construction Co., no longer represented by the law firm of Snell & Wilmer, filed nothing.

With their statement of position, Respondents Sage Development Company and M & O Construction Co., Inc., filed a Motion for Leave to Amend Answer and to Withdraw Stipulation. Respondents also filed affidavits of Sage Development Company and M & O Construction Co., Inc., officials, both dated May 11, 1983, and previously submitted to the Board, attesting to the fact than their relationship with the Union began with the union representative asking each to sign a ''short form'' or ''memorandum'' agreement. The affidavits go on to state that at no time during those contract terms did the Union offer any proof of majority status through an election, certification, or by any other means. It is undisputed that neither General Counsel nor Charging Party has submitted, either to the Board, or to me, any counter affidavits.

In his ''Statement of Position'' General Counsel objected to Respondents' motion for leave to amend answer and to withdraw stipulation, and strongly urged that the record be reopened and that a supplemental hearing be conducted on the issues raised by the remand.

On September 29, 1988, I issued an Order granting Respondents' motion, pursuant to footnote 1 of the Board's Order Remanding. In my Order, I also indicated a willingness to reopen the record and to conduct a supplemental hearing, contingent on General Counsel's acknowledging his burden of proof on the issue of 9(a) status, by submitting to me a written statement, either unequivocally affirming that ''they [General Counsel and/or Charging Party] currently possess what they believe to be sufficient evidence to prove 9(a) status, or such other statement as will more appropriately reflect their position.'' On receipt of said assurances, a supplemental proceeding was to be scheduled.

With candor and dispatch, General Counsel submitted the requested statement on October 21, 1988. While acknowledging that he currently lacks any evidence to support his burden of proof on the 9(a) status issue, General Counsel renewed his request to engage in general unrestricted discovery of Respondents' witnesses, files and records, all in the hope—not even in the expectation—that he might find some evidence to support his burden of proof. I reject General Counsel's request as unduly speculative, burdensome to Respondents and prejudical to their interests. Moreover, nothing in the Board's Order Remanding nor in the Rules and Regulations governing Board litigation generally suggests that a party with the burden of proof on any issue, should have Board-sponsored prehearing discovery to determine whether there might be evidence somewhere that the party could use, to prove the ultimate issue.

I also reject as lacking merit, General Counsel's alternative contention that by entering into certain Settlement Agreements 5 or 6 years ago, Sage Development Company and M & O Construction Co., Inc., impliedly recognized the Union as a 9(a) representative.[1]

[1] Cf. *Riley Electric, Inc.*, 290 NLRB 374 fn. 3 (1988).

According to General Counsel, this argument was originally presented to the Board by him in his answering brief and motion to strike affidavits, dated May 26, 1987. In its Order Remanding, the Board did not address the significance, if any, of the settlement agreements, stating in its Order, ''In view of our determination to remand this case, we find it unnecessary at this time to pass on the exceptions and cross-exceptions to the judge's decision.'' If the Board felt that the General Counsel's argument with respect to the settlement agreements, resolved the question of 9(a) status, it is hard to see why the Board would have remanded the case. Indeed, if the Board felt that the argument was relevant at all, it is hard to see why the Board would not have so stated.

In any event, the Board will decide, if it chooses to do so, the merit of General Counsel's arguments. I can only recommend that the argument be rejected. In so recommending to the Board, I note General Counsel's adamant position that the settled cases not be reopened to ascertain exactly what caused Respondents to enter into the settlement agreements in the first place. While I agree this should not be done, I also find that General Counsel should be estopped from finding an implied admission of 9(a) status, applicable in the instant case. A Respondent may choose to settle a case for any number of different reasons, including the state of the law with respect to 8(f) contracts as it then existed.

In sum, I conclude that at all times relevant, Respondents Sage Development Company and M & O Construction Co., Inc., had an 8(f) relationship with the Union. I further conclude there is no reason to believe that General Counsel and/or Charging Party either can prove 9(a) status now, or could find sufficient evidence to prove 9(a) status by subpoenaing Respondents' officials, records, or files. I find therefore, that it is not necessary to reopen the record or to hold a supplemental hearing.

As to Respondent Joe Guzman Construction Co., it has elected not to participate in this remand proceeding. On October 28, 1988, I caused a conference telephone call to be made, wherein all sides were represented. For Respondent Joe Guzman Construction Co., a Mr. Slattery was designated by his superiors to participate. Based on statements made by Mr. Slattery, it is clear that Respondent Joe Guzman Construction Co. made a calculated decision not to participate in the remand. Attorney Winterscheidt added that Joe Guzman Construction Co. did not express an interest in having the Snell & Wilmer law firm represent its interests in this proceeding.[2] Accordingly, as to Respondent Joe Guzman Construction Co. only, the admissions and stipulations by which it admitted 9(a) status of the Union have not been withdrawn. Because it is not affected by the case of *John Deklewa & Sons*, 282 NLRB 1375 (1987), there is no reason to reopen the record or to hold a supplemental hearing.

I recommend to the Board that pursuant to the case of *John Deklewa & Sons*, supra, the labor agreements entered into by Respondents Sage Development Company and M & O Construction Co., Inc., be considered 8(f) agreements. I further recommend that as to Respondent Guzman, the case be treated as though it had entered into 9(a) agreements and that my original order be adopted.

In both cases, the pending exceptions and cross-exceptions should be evaluated in light of these supplemental findings and recommendations.

[2] To the extent that Respondent Joe Guzman Construction Co., may not have been initially served with relevant documents, Attorney Winterscheidt asserted that her law firm mailed copies of all pleadings to Guzman as a courtesy. Slattery did not disagree with this statement.